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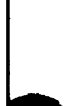
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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XXII.

LANDLORD AND TENANT—MUTUAL INSURANCE.

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DAVID ATWOOD,
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MADISON, WIS.

EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

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Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
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Daveis.....	Dav.	Utah Territory	Utah T'y.
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Holmes	Holmes.	Woodbury & Minot	Woodb. & M
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
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Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

LANDLORD AND TENANT.

[In bankruptcy proceedings, see DEBTOR AND CREDITOR.]

I. IN GENERAL, §§ 1-197.
II. WASTE, §§ 198-225.

III. FIXTURES, §§ 226-244.
IV. LIEN, §§ 245-259.

I. IN GENERAL.

SUMMARY — *Disputing landlord's title*, §§ 1, 2. — *Effect of judgment in ejectment*, § 3. — *Covenant for abatement of rent*, § 4. — *Repairs*, §§ 5, 6. — *Deed of trust of leasehold property; rights of grantee*, § 7. — *Contract by correspondence construed*, § 8. — *Surrender of lease*, § 9. — *Capacity in which lessors contracted*, § 10. — *Contract for renewal; relief in equity*, § 11. — *Stipulation held to be a condition*, § 12. — *Demand of rent*, § 13. — *Deed and lease for different parts of same property*, § 14.

§ 1. A tenant cannot dispute the title of his landlord, either by setting up title in himself or in a third person during the existence of the lease or tenancy; but where the tenant disclaims holding under the landlord, and the landlord, having knowledge of such disclaimer, rests until the statute of limitations has run against him, the tenant will hold. *Willison v. Watkins*, §§ 15-20.

§ 2. When a tenant disclaims his landlord before his lease has expired, this forfeits the lease, and he is not entitled to notice to quit; and if the landlord has knowledge of the disclaimer, he has a right to treat the lessee as a trespasser. *Ibid.*

§ 3. In Indiana, where a landlord sues in ejectment for the recovery of his estate as forfeited for non-payment of rent, and obtains judgment, this establishes the validity of the lease; that the tenant was in possession; that he was obliged to pay the rent reserved; that the instalments demanded were due and unsatisfied, which facts the tenant is estopped from denying. *Sheets v. Selden*, §§ 21-25.

§ 4. Where, on a lease of a water-power, specifying rates of abatement of rent for failure of water, the landlord obtains judgment against the tenant for forfeiture of his estate for non-payment of rent reserved, the tenant must tender payment of the difference between the rents due and the abatement to which he was entitled for failure of water, before he can ask relief from the forfeiture. *Ibid.*

§ 5. A covenant that a landlord will make repairs is never implied. *Ibid.*

§ 6. A covenant with several lessors to keep premises in repair is joint, although the lessors hold in unequal proportions, and the rent is reserved to them severally in proportion to their several interests. *Calvert v. Bradley*, §§ 26, 27.

§ 7. Where a deed of trust is given of leasehold property, by the provisions of which the grantor or mortgagor is to retain possession until default, and the grantee or mortgagee never enters into possession under his deed, he is not chargeable with the covenants in the lease to his grantor. *Ibid.*

§ 8. The United States entered upon possession of premises, under a lease which consisted of the correspondence between the lessor and the agents of the government. By the terms of the agreement the premises were let for one year with the privilege of three, at a fixed rent, the premises to be used for "all purposes." *Held*, 1st, that the lessor could recover no damages on account of the premises having been used for a small-pox hospital; 2d, that the lessor having accepted, without objection, a reduced rate of rent after the first year, such acceptance was conclusive evidence of his assent to such a modification of the original agreement as to the rate of rent; 3d, that although there was no express covenant as to waste, the law implied one, and that the lessee was liable for the destruction of ornamental trees, fences, walls, etc., and the

quarrying and removal of stone and gravel by the soldiers, as voluntary waste; but that damages for injuries done by United States troops before the premises were entered upon under the lease could not be recovered in this action for rent in the court of claims; 4th, that there being no covenant to repair, the government as tenant was not liable for accidental damages, such as the destruction of the buildings by fire. *United States v. Bostwick*, §§ 28-36.

§ 9. A surrender of a lease is the yielding up the estate to the landlord so as to extinguish it by mutual consent, and may be either by express words by which such intention is manifested, or by some act which implies that both parties have agreed to consider the surrender as made. Where a lease was executed to A. and B., C. being a silent partner with them although not mentioned in the lease, and A. withdrew, assigning his interest to B. and C., only one of the lessors being consulted; and later B. and C. assigned their interest to D., whom the lessors refused to recognize as tenant, all rent paid by him being accepted as due from B. and C., *held*, there having been no new writings executed, that there had been no surrender of the original lease. *Beall v. White*, §§ 87-89.

§ 10. Where lessors, in executing a lease, described themselves as a committee acting in behalf of a religious institution, but demised the lands in their individual capacity, the covenants of the lessee being to them as individuals, the lessee having entered upon and enjoyed the premises under the lease, *held*, in an action of covenant by the lessors, that the recital in the lease representing them as a committee was not inconsistent with their holding the legal title in trust, and that it was a fair inference from this language that they held some title in trust sufficient to warrant the execution of a lease and to estop the lessee from denying their title as lessors. *Scott v. Rutherford*, §§ 40, 41.

§ 11. A lease of property was executed for ten years, the lessor covenanting to renew the lease every ten years thereafter for a period of five hundred years, the rental for each term of ten years to be fixed by assessors appointed by the parties. The lessee, relying upon the covenant to renew, made improvements on the demised premises costing over \$100,000. But the lessor fraudulently prevented a renewal of the lease by appointing incompetent persons, and brought suit at law for use and occupation of the premises after the expiration of the first term. Upon bill brought by the lessee, the court ordered that, as the lessee was willing to have a renewal, the proceedings at law should be stayed until the lessor should appoint a competent and impartial assessor to determine the value of the rental for the second term. *Tscheider v. Biddle*, §§ 42-45.

§ 12. A stipulation in a lease to E., that in default of payment of rent "for any year during said term, said lease is to be void, and said property is at once to revert in me, or my heirs or assigns, without notice to the said E., in the same manner as if this lease had not been given," is a condition, not a limitation, and gives the lessor the option to avoid the lease, by entry, but does not invalidate it *proprio vigore*. *Wildman v. Taylor*, §§ 46-48.

§ 13. To avoid a lease for non-payment of rent, there must be a demand of the precise sum due, at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. Thus a demand generally for rent due was held insufficient, and by reason of such insufficiency the possession of the demised premises was adjudged to belong to the assignee in bankruptcy of the tenant, and not to the devisees of the lessor. *Ibid*.

§ 14. Where a deed and lease were executed at the same time to the same grantee, the former conveying one-half of certain property, with a hat factory thereon, "also all the machinery situated in said factory, which was possessed and owned by me before the 12th day of August, 1855," and the latter granting at a yearly rent the other half of the same property, "also all the machinery situate and now being in said manufactory," *held*, that half of the machinery was conveyed absolutely and half leased. *Ibid*.

[NOTES.—See §§ 49-197.]

WILLISON v. WATKINS.

(8 Peters, 49-56. 1830.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—This was an action of trespass to try titles, brought in 1822, in the circuit court of the United States for the district of South Carolina, by Watkins against Willison, for a tract of land containing six hundred acres, on the Savannah river. This land was originally granted to James Parsons, who conveyed to Ralph Phillips, whose estate was confiscated by an act of assembly of South Carolina, and vested in five commissioners appointed by the legislature of that state. The five commissioners acted in execution

of the law, but, before any conveyance was made of the land in question, one of them had died, and two of the others had ceased to act, or resigned, in 1783. The two remaining commissioners, in 1788, conveyed this land to Daniel Bordeaux and R. Newman, who in the same year executed to the treasurer of the state a bond and mortgage to secure the payment of the purchase money, which, pursuant to an act of assembly passed for that purpose in 1801, was transferred and delivered to Ralph S. Phillips, the son of Ralph Phillips, to be disposed of as he should think proper; and by the same law the confiscation act, so far as respected Ralph Phillips, was repealed. A suit was brought on this bond in the name of the treasurer of the state, in 1803, against Daniel Bordeaux, and prosecuted to final judgment against his administrators in 1817, when an execution issued, on which the land was sold and conveyed by deed from the sheriff to Anderson Watkins, the plaintiff in the circuit court, who claims by virtue of the sheriff's deed, and as standing in the relation of landlord to the defendant.

Samuel Willison, the father of the defendant, entered into possession of the premises in question in 1789, and cultivated them till his death in 1802; from which time his widow and children possessed them till her death in 1815; since which time the children have retained possession by their tenants, till the commencement of this suit.

In 1802, Ralph S. Phillips, who was then the assignee of the bond and mortgage, made a demand of the possession from the widow, who refused to give it up, and set up a title in herself. He brought an action of trespass against her to try titles in January, 1803, in which he was nonsuited in November, 1805; and in March, 1808, he brought another action of the same nature against her, in which no proceedings were had after 1812, which by the law and practice of South Carolina operates as a discontinuance of the action.

In 1792, Bordeaux, the mortgagor, executed to Willison a power of attorney authorizing him to take possession of the land and sue trespassers. Willison was then a tenant of Bordeaux. In 1793 they were in treaty for the sale of the land, Bordeaux wanting to sell and Willison to purchase. But during the life-time of Willison, Bordeaux was apprised that he claimed to hold the land by an adverse title. The defendant exhibited no title other than what is derived from the possession of his father and the family.

The first question which arose at the trial was on the admission in evidence of the deed from the two commissioners to Bordeaux and Newman; the defendant alleging that no title passed by it, because it was not signed by the other two commissioners. The circuit court overruled the objection; the deed was read, and this becomes the subject of the first error assigned in this court. As the court have been unable to procure the confiscation act of South Carolina, we are unwilling to express any opinion on this exception without examining its provisions, which are very imperfectly set out in the record; and as the merits of the case can be decided on another exception, we do not think it necessary to postpone our judgment.

The remaining exception is that the circuit court erred in charging the jury that the claim of the plaintiff was not barred by the act of limitations of South Carolina, which protects a possession of five years from an adverse title. It appears from the record that the defendant and his family have been in possession of this land for thirty-three years next before this suit was brought; but whether that possession has been adverse to the title of the plaintiff during

the whole of that time, or such part of it as will bring him within the protection of this law, becomes a very important inquiry.

The plaintiff contended at the trial, that, by becoming the tenant of Bordeaux, Willison the elder and his heirs, so long as they remain in possession, are prevented from setting up any title in themselves, or denying that of Bordeaux, without first surrendering to him the possession and then bringing their suit. That the possession of the tenant being the possession of the landlord, he could do no act by which it could become adverse, so that the statute of limitations would begin to run in his favor or operate to bar his claim, by any lapse of time, however long. The defendant, on the other hand, contended that, from the time of the disclaimer of the tenancy by Willison, and the setting up of a title adverse to Bordeaux and with his knowledge, his possession became adverse, and that he could avail himself of the act of limitations if no suit was brought within five years thereafter.

§ 15. *A tenant cannot dispute the title of his landlord by setting up title either in himself or a third party during the existence of the lease or tenancy.*

It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtained and holds possession. 7 Wheat., 535. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title and ready to be surrendered by its termination by the lapse of time or demand of possession. The same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning or to admit of a doubt.

§ 16. — *but where the tenant disclaims holding under the landlord, and the knowledge of this comes to the landlord, and he rests for thirty years thereafter, the statute of limitations runs against him and the tenant will hold.*

But we do not think that, in any of these relations, it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. Few stronger cases than this can occur, and if the plaintiff can recover without any other evidence of title than a tenancy existing thirty years before suit brought, it must be conceded that no length of time, no disclaimer of tenancy by the tenant, and no implied acquiescence of the landlord, can protect a possession originally acquired under such a tenure. If there is any case which could clearly illustrate the sound policy of acts of repose and quieting titles and possessions by the limitation of actions, it is in this.

§ 17. *When a tenant disclaims his landlord before his term of lease is out, this forfeits the lease; and he is not entitled to notice to quit. If the landlord has knowledge of the disclaimer, he is bound to treat the tenant as a wrong-doer.*

Here was no secret disclaimer, no undiscovered fraud; it was known to Bor-

deaux, and was notice to him that Willison meant to hold from that time by his own title and on adverse possession. This terminated the tenancy as to him, and from that time Bordeaux had a right to eject him as a trespasser. Adams on Eject., 118; Bull. N. P., 96; 6 Johns., 272.

Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them. Having thus a right to consider the lessee as a wrongdoer holding adversely, we think that, under the circumstances of this case, the lessor was bound so to do. It would be an anomalous possession, which, as to the rights of one party, was adverse, and as to the other fiduciary, if, after a disclaimer with the knowledge of the landlord and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease he ought to be entitled to, such as results from his known adverse possession. No injury can be done the landlord unless by his own laches. If he sues within the period of the act of limitations, he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time.

As to the assertion of his claim, the possession is as adverse and as open to his action as one acquired originally by wrong, and we cannot assent to the proposition that the possession shall assume such character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease; he is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

§ 18. — *at the end of the term the landlord may treat the tenant as a trespasser; but if he let him remain, he becomes a tenant at will, or from year to year, and is entitled to notice to quit.*

It is on this principle alone that the plaintiff could claim to recover in this action. If there was between him and the defendant an existing tenancy at the time it was brought, he had no right of entry. The lessee cannot be a trespasser during the existence of the lease, and cannot be turned out till its termination. At the end of a definite term, the lessor has his election to consider the lessee a trespasser and to enter on him by ejectment; but if he suffers him to remain in possession, he becomes a tenant at will, or from year to year, and in either case is entitled to a notice to quit before the lessor can eject him. The notice terminates the term, and thenceforth the lessee is a wrongdoer and holds at his peril. Woodfall's Land. & Ten., 218, 220; 2 Serg. & Rawle, 49.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person, or his own, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation, but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he also affirms the tenancy, and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and defendant, which can protect his possession from his adversary suit, and at

the same time recover on the ground of there being a tenure so strong that he cannot set up his own adversary possession.

The plaintiff claims without showing any title in himself or any right of possession, except what exists from the consequences of a tenancy, the existence of which he denies in the most solemn manner, by asserting its termination before suit brought.

The principle here asserted is not new in this court. In the case of *Blight v. Rochester*, 7 Wheat., 535, 549, the plaintiffs' lessors claimed as heirs of John Dunlap; the defendant claimed by purchase from one Hunter, who professed to have purchased from Dunlap. The defendant acknowledged the title of Dunlap as the one under which he held. Dunlap had, in fact, no title, but the plaintiffs insisted that the defendant could not deny his title. The chief justice, in giving the opinion of the court, observes: If he holds under an adversary title to Dunlap, his right to contest his title is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence.

We are not aware that, in applying this doctrine to the case now before the court, we shall violate any settled principle of the common law. If a different rule was established, the consequences would be very serious. A mortgagee, a direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relations to the landlord with all their legal consequences, and they are as much estopped from denying the tenancy. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we could give our sanction to such a doctrine.

An examination of the authorities on this point relieves our minds from all such apprehensions, by finding our opinion supported to its full extent by judicial decisions entitled to the highest respect, and which we may safely adopt as evidence of the common law.

The case of *Hovenden v. Lord Annesley*, 2 Sch. & Lef., 607, was that of a tenant who had attorned to one claiming adversely to his lessor with his knowledge. In delivering his opinion, Lord Redesdale entered into a detailed view of the decisions on the application of the act of limitations to trusts of real and personal estate in courts of law and chancery, and to fiduciary possessions generally. On the point directly before us he observes: "That the attornment will not affect the title of the lessor so long as he has a right to consider the person holding possession as his tenant. But as he has a right to punish the acts of his tenant in disavowing the tenure by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was destroyed, and there must be a limitation to this as well as every other demand. The intention of the act of limitations being to quiet the possession of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of the original lessor for the term of ninety-nine years. That would, I think, be too strong to hold on the ground of the possession being in the lessor, after the tenure had been disavowed to the knowledge of the lessor."

The relation between tenants in common is, in principle, very similar to that between lessor and lessee; the possession of one is the possession of the other, while ever the tenure is acknowledged. Cowp., 217. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run. 2 Sch. & Lef., 628, etc., and cases cited 4 Serg. & R., 570. The possession of a trustee is the possession of the *cestui que trust*, so long as the trust is acknowledged; but from the time of known disavowal it becomes adverse. So of a mortgagee, while he admits himself to be in as a mortgagee, and therefore liable to redemption. 7 Johns. Ch., 114, etc., and cases cited. But if the right of redemption is not foreclosed within twenty years, the statute may be pleaded; and so in every case of an equitable title, not being the case of a trustee whose possession is consistent with the title of the claimant. 7 Johns. Ch., 122.

§ 19. *The statute of limitations only begins to run from the time the adverse possession is known to the party seeking to recover.*

After elaborately reviewing the English decisions on these and other analogous subjects, Chancellor Kent remarks, it is easy to perceive that the doctrines here laid down are the same that govern courts of law in analogous cases, and the statute of limitations receives the same construction and application at law and in equity. *Kane v. Bloodgood*, 7 Johns. Ch., 90, 122. It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute does not run until the discovery of the fraud; for the title to avoid it does not arise until then; and pending the concealment of it, the statute ought not to run. But after the discovery of the fact imputed as fraud, the statute runs as in other cases; and he cites, in support of this position, 1 Browne's Parliament. Cases, 455; 3 P. Wms., 143; 2 Sch. & Lef., 607, 628, 636, and the cases cited.

In the case of *Hughes v. Edwards*, 9 Wheat., 490, 497, it was settled that the right of a mortgagor to redeem is barred after twenty years' possession by the mortgagee after forfeiture, no interest having been paid in the meantime, and no circumstance appearing to account for the neglect. 7 Johns. Ch., 122; 2 Sch. & Lef., 636. The court in that case say, that in respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to remain in possession the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, or the like.

§ 20. *Setting up or attorning to a title adverse to the landlord by the tenant is a fraud.*

All these principles bear directly on the case now before us; they are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorning to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why then should not the statute protect him as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to

retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action.

In doing this we do not intend to dispute the principle of any case adjudged by the supreme court of South Carolina. Of those which have been cited in the argument there are none which, in our opinion, controvert any of the principles here laid down, or profess to be founded on any local usage, common law, or construction of the statute of limitations of that state. One has been much pressed upon us, as establishing a doctrine which would support the position of the plaintiff, which deserves some notice. In the case in 1 Nott & McCord, 374, the court decide that where a defendant enters under a plaintiff he shall not dispute his title while he remains in possession, and that he must first give up his possession and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing in terms tenants in common, trustees, mortgagees and lessees, but disallowing none of the exceptions or limitations which qualify it and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay; leaving the rule in full force wherever the suit is brought within the time prescribed by law. To this extent, and this only, the decision would reach. To carry it further would be giving a more universal application than the courts of South Carolina would seem to have intended, and further than we should be warranted by the rules of law. To extend it to cases of vendor and vendee would be in direct contradiction to the solemn decision in 7 Wheat., 525.

In relation to the limitation of actions for the recovery of real property, we think it proper to apply the remarks of the learned judge who delivered the opinion of this court in the case of Bell v. Morrison, 1 Pet., 351, and to say that the statute ought to receive such a construction as will effectuate the beneficent objects which it intended to accomplish, the security of titles and the quieting of possessions. That which has been given to it in the present case is, we think, favorable to its true spirit and intention, without impairing any legal principle heretofore established.

It is therefore the opinion of the court that the plaintiff in error has sustained his fourth exception, and that the judgment of the circuit court must be reversed. The cause is remanded to the circuit court, with directions to award a *venire de novo*.

MR. JUSTICE JOHNSON delivered a brief opinion to the effect that in trying the case below he was guided by the law of South Carolina, which, as settled by the decisions of that state, was that "when once a tenancy was proved, the tenant could make no defense, but must restore possession, and then alone could he avail himself of a title derived from any source whatever, inconsistent with the relation of tenant."

SHEETS v. SELDEN.

(7 Wallace, 416-425. 1868.)

ERROR to U. S. Circuit Court for Indiana.

STATEMENT OF FACTS.—The state of Indiana was the owner of a canal, and made two leases of the surplus water, one to Yandes and Sheets and one to Sheets alone. The rents were payable semi-annually, and there was a provision forfeiting all rights under the leases if rent should remain unpaid for one month after it was due, and authorizing any agent or lessee of the state to enter, etc. It was also provided that the lessees should not be deprived of the use of water for a period exceeding one month in any one year, and making a deduction from the rent at a specified rate in case this provision was violated.

Sheets became the owner of the interest of Yandes in the lease to Yandes and Sheets, and the state sold to Selden and others the portion of the canal and lands covered by the leases. Rents remaining due and unpaid, the purchasers made demand, and brought an action of ejectment in the state court to recover possession and forfeit the leases, in which action they recovered a judgment. Subsequently the lessees filed the bill in this case to prevent the issuing of a *habere facias* on the judgment, and for the redemption of the lands from the forfeiture. The bill alleged a tender of a certain amount pending the ejectment suit, and set up, as an excuse for a failure to tender for other rents due, claims for damages arising out of an alleged breach of covenants contained in the leases.

Opinion by MR. JUSTICE SWAYNE.

This is a case in equity. The appellant filed his bill to enjoin the execution of a judgment in ejectment. The defendants demurred, and the demurrer was sustained.

§ 21. *This court will not interfere with the action of an inferior court, giving leave to amend a bill in equity on certain terms, which appellant declined to accept.*

The court gave leave to amend upon terms which the appellant declined to accept. A decree was thereupon entered that the bill should be dismissed, and for costs. This appeal brings the case here for review. With the leave to amend we have nothing to do. The terms imposed were within the discretion of the court, and are not open to examination in this proceeding.

The only question before us is, whether the circuit court erred in sustaining the demurrer and dismissing the case. The bill is very voluminous. We will consider the points to which our attention has been called, so far as is necessary to the proper determination of the rights of the parties. The recovery was had in the action of ejectment, upon the ground of forfeiture for the non-payment of the rents reserved in two leases.

§ 22. *Power of courts of law and equity to relieve against forfeitures for non-payment of rent.*

Both courts of law and of equity have power to give relief in cases of this kind. Courts of law give it upon motion, which may be made before or after judgment. If after judgment, it must be made before the execution is executed. The rent due, with interest and costs, must be paid. Upon this being done, a final stay of proceedings is ordered. Tidd's Prac., 3 Amer. ed., 1234; Phillips v. Doelittle, 8 Mod., 345; Smith v. Parks, 10 id., 383; Atkins v. Chilson, 11 Met., 115. The first British statute upon the subject was the 4th George II.,

chapter 28. The practice is now regulated by the 15 and 16 Victoria, chapter 76.

Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The authorities going beyond this he held to be unsound and declined to follow them. Speaking of *Wadman v. Calcraft*, 10 Ves., 68, he said the master of the rolls in that case held, "that though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages." *Hill v. Barclay*, 18 Ves., 63. Such is now the settled English rule upon the subject. 2 Story's Eq., §§ 1315, 1316; *Davis v. West*, 12 Ves., 475; *Reynolds v. Pitt*, 19 Ves., 134; *Gregory v. Wilson*, 10 Eng. L. & Eq., 138; *Eaton v. Lyon*, 3 Ves., 690; *Hill v. Barclay*, 16 id., 402. In *Bracebridge v. Buckley*, 2 Price, 200, Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country. 2 Story's Eq., §§ 1315, 1316, and notes.

Lord Redesdale held that where there were unsettled accounts between the landlord and tenant, which could not be properly taken at law, the payment or tender of money on account of the rent might be deferred until the rights of the parties were settled by the decree of the court, but that where the accounts were not of this character, equity would not intervene. *O'Mahony v. Dickson*, 2 Sch. & Lef., 400; *O'Connor v. Spaight*, 1 id., 305.

§ 23. *Effect of judgment in ejectment by landlord against tenant.*

The recovery in ejectment is an important feature in the case before us. In Indiana the action is regulated by statute, and the judgment has the same conclusiveness and effect as common law judgments in other cases. The judgment against the appellant established the validity of the leases, that he was in possession, his obligation to pay the rents reserved, and that the instalments demanded were due and unsatisfied. He is estopped from denying these facts, and from setting up anything in this case to the contrary.

In the case of *The Trustees of the Wabash and Erie Canal v. Brett*, 25 Ind., 410, the trustees had leased so much of the surplus water of the canal as might be necessary for the purposes specified. The right was reserved, upon paying for the mill to be built by the lessee, to resume the use of the water leased whenever it might be necessary for navigation, or whenever its use for hydraulic purposes should be found to interfere with the navigation of the canal. It was averred that the trustees had abandoned that part of the canal, and

suffered it to go to decay, so that the water-power was destroyed, and the plaintiff's mill rendered valueless. The court held that there was no implied covenant to keep the canal in repair; that the express provision for compensation in one case excluded the implication of such right in all others, and that the plaintiff was without remedy. This case, like the one under consideration, was decided upon a demurrer by the defendants.

§ 24. *A covenant that a landlord will make repairs is never implied.*

The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. *Aspdin v. Austin*, 5 Q. B., 671; *Pilkington v. Scott*, 15 Mees. & W., 657. A covenant is never implied that the lessor will make any repairs. *Pomfret v. Ricroft*, Williams' Saunders, 321, 322, note, 1; *Kellenberger v. Foresman*, 13 Ind., 475; *Mumford v. Brown*, 6 Cowen, 475. The tenant cannot make repairs at the expense of the landlord unless by special agreement. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable as if the accident had not occurred. *Moffat v. Smith*, 4 N. Y., 126. If, in such a case, the landlord receives insurance money, the tenant has no equity to have it applied to rebuilding, or to restrain the landlord from suing for the rent until the structure is restored. *Leeds v. Cheetham*, 1 Sim., 146; *Loft v. Dennis*, 1 Ell. & Ell., 474.

The *Trustees of the Wabash and Erie Canal v. Brett* is an authority strikingly apposite in this case. In the leases set out in the bill, as in the lease in that case, the parties provided but one remedy for a failure of water. That is, an abatement of the rent in proportion to the extent and time of the deficiency. The contract gives none other. Beyond this it is silent upon the subject. This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them. The appellant is entitled to the remedy specified. *Expressum facit cessare tacitum*. Neither a court of equity nor a court of law can aid him to any greater extent. This sweeps from the case the claims set up in the bill by the appellant for offset, repairs, recoupment and damages, leaving to be considered only the claim for a reduction of the rents in the manner stipulated by the parties.

The appellant avers that he abandoned the premises covered by the second lease, that the appellees acquiesced, and that his title thus became vested in them by reverter. This is repelled by the verdict and judgment in the action of ejectment. He insists that, according to the provision referred to in the leases, he is entitled to a reduction of the rents specifically demanded before the commencement of the action of ejectment. The plaintiffs could not have recovered without proving to the satisfaction of the jury that the exact amount demanded was due. Any failure in this respect would have been fatal to the action. Then was the time for the appellant to assert and prove this claim. He cannot do it now. The judgment is conclusive.

§ 25. *Relief against judgment in ejectment for recovery of estate for non-payment of rent.*

The bill claims reductions of the rents for failure of water from the 2d of October, 1857, when the title of the defendants accrued, down to the 1st of May, 1865, when the last instalments, before the filing of the bill, became due, amounting in the aggregate to \$2,649. The rents, during the same period, amounted to a much larger sum. Conceding the appellant's demand to be correct, he should at least have tendered payment of the difference between these two amounts, and interest, before bringing his bill. In not alleging that he had done so the bill is fatally defective.

A case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the appellant throughout the litigation between the parties, as disclosed by the bill, is not persuasive to such a tribunal to lend him its aid. We think the demurrer was well taken. The decree of the circuit court is affirmed.

CALVERT v. BRADLEY.

(16 Howard, 580-599. 1853.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The plaintiffs brought their action of covenant, in the court above mentioned, against the defendants, to recover of them in damages the value of repairs made by the plaintiffs upon certain property in the city of Washington, known as the National Hotel, which had been on the 17th of April, 1844, leased by the plaintiffs, together with Roger C. Weightman, Philip Otterback, William A. Bradley, and Robert Wallach, to Samuel S. Coleman, for the term of five years. This property was owned by the lessors in shares varying in number as to the several owners, and by the covenant in the deed of demise; the rent was reserved and made payable to the owners severally in proportion to their respective interests, the interests of the plaintiffs only in the shares owned by them being joint. In addition to the covenant on the part of the lessee for payment to each of the lessors of his separate proportion of the rent, there is a covenant by the lessee for the payment of the taxes and assessments which might become due upon the premises during the term, and a further covenant that he would, during the same time, “keep the said hotel with the messuages and appurtenances in like good order and condition as when he received the same; and would, at the expiration of the said term, surrender them in like good repair.” On the 1st of January, 1847, the lessee, Coleman, assigned all his interest in the lease to Cornelius W. Blackwell, who entered and took possession of the premises. On the 17th of February, 1848, Blackwell, by deed-poll, conveyed to the defendants, Bradley and Middleton, all the goods, chattels, household stuffs, and furniture then upon the premises, together with the good will of the said hotel and business and the rest and residue of the unexpired term and lease of said Blackwell in the premises—upon trust to permit the said Blackwell to remain in possession and enjoyment of the property until he should fail to pay and satisfy certain notes and responsibilities specified in the instrument; but upon the failure of Blackwell to pay and satisfy those notes and responsibilities, the trustees were to take possession of the property conveyed to them, and to make sale thereof at public auction for the purposes in the deed specified. Blackwell remained in possession after the execution of the deed to the defendants, until the 6th of March, 1849, when he absconded, leaving a portion of the rent of the premises in arrear. The property having been thus abandoned by the tenant, an agreement was entered into between the owners of the property and the defendants, that a distress should not be levied for the rent in arrear, but that the defendants should sell the effects of Blackwell left upon the premises, and from the proceeds thereof should pay the rent up to the 1st day of May, 1849,—the defendants refusing to claim or accept any title to, or interest in, the unexpired portion of the lease, or to take possession of the de-

mised premises. In this state of things the plaintiffs, being the largest shareholders in those premises, proceeded to take possession of and to occupy them and to put upon them such repairs as by them were deemed necessary, and have continued to hold and occupy them up to the institution of this suit. The action was brought by the plaintiffs alone, and in their own names, to recover their proportion of the damages alleged by them to have been incurred by the breach of the covenant for repairs contained in the lease to Coleman, which was assigned to Blackwell, and by the latter to the defendants by the deed-poll of February 17, 1848.

To the declaration of the plaintiffs the defendants pleaded four separate pleas. To the third and fourth of these pleas the defendants demurred, and as it was upon the questions of law raised by the demurrer to these pleas that the judgment of the court was given, we deem it unnecessary to take notice of those on which issues of fact were taken. The third and fourth pleas present substantially the averments that the deed from Blackwell to the defendants was simply and properly a deed of trust made for the security of certain debts and liabilities of Blackwell, therein enumerated; and giving power to the defendants, in the event of the failure on the part of Blackwell to pay and satisfy those responsibilities, to take possession of the subjects of the trust and dispose of them for the purposes of the deed. That this deed was not in law a full assignment of the term of Blackwell in the demised premises, and never was accepted as such, but on the contrary was always refused by the defendants as such; and that the plaintiffs by their own acts would have rendered an acceptance and occupation by the defendants, as assignees of the term, impracticable, if such had been their wish and intention, inasmuch as the plaintiffs themselves had, upon the absconding of Blackwell, the assignee of Coleman, entered upon and occupied the demised premises, and held and occupied the same up to the institution of this action, and had, during that occupancy, and of their own will, made such repairs upon the premises as to the plaintiffs has seemed proper or convenient.

Upon the pleadings in this cause two questions are presented for consideration; and comprising as they do the entire law of the case, its decision depends necessarily upon the answer to be given to those questions. The first is whether the plaintiffs in error, as parties to the deed of covenant on which they have declared, can maintain their action without joining with them as co-plaintiffs the other covenantees?

The second is whether the defendants in error, in virtue of the legal effect and operation of the deed to them from Blackwell, the assignee of Coleman, and without having entered upon the premises in that deed mentioned, except in the mode and for the purposes in the third and fourth pleas of the defendants set forth and admitted by the demurrer, were bound for the fulfillment of all the covenants in the lease to Coleman as regular assignees would have been? The affirmative of both these questions is insisted upon by the plaintiffs.

The converse as to both is asserted by the defendants, who contend as to the first, that the covenant for repairs declared on, and of which profert is made, is essentially a joint contract, by and with all the covenantees, and could not be sued upon by them severally; and that the demurrer to the third and fourth pleas, reaching back to and affecting the first vice in the pleadings, shows upon the face of the declaration, and of the instrument set out *in hæc*

verba, a restriction upon the plaintiffs to a joint interest, or a joint cause of action only with all their associates in the lease.

2. That the deed from Blackwell to the defendants, being a conveyance of a leasehold interest in the nature of a trust for the security of a debt, by the terms of which conveyance the grantor was to remain in possession till default of payment, and the grantees not having entered into possession of the demised premises, which were entered upon and held by the plaintiffs themselves, the defendants could not be bound, under the covenant for repairs, to the premises never in their possession and over which they exercised no control.

§ 26. *A mortgagee of a term of years, who has not taken possession, is not to be considered as a complete assignee, and is not chargeable with the real covenants of the assignor.*

The second of the questions above mentioned, as presented by the pleadings, will be first adverted to. This question involves the much controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, pledged as security for a debt, but of which the mortgagee has never had possession, for the performance of all the covenants to the fulfillment whereof a regular assignee of the lease would be bound.

With regard to the law of England, as now settled, there seems to be no room for doubt that the assignee of a term, although by way of mortgage or as a security for the payment of money, would be liable under all the covenants of the original lessee. In the case of *Eaton v. Jacques*, reported in the second volume of *Douglas*, page 455, this subject was treated by Lord Mansfield with his characteristic clearness and force; and with the strong support of Justices Willes, Ashurst and Buller, he decided that the assignee of a lease by way of mortgage or as a mere security for money, and who had not possession, is not bound for or by the covenants of the lessee. The language of his lordship in this case is exceedingly clear. "In leases," said he, "the lessee being a party to the original contract, continues always liable notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burden while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it is an absolute conveyance? It was a mere security, and it was not, nor ever is, meant that possession shall be taken until the default of payment and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession he could not have entered *via facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law." The same doctrine was sanctioned in the case of *Walker v. Reeves*, to be found in a note in *Douglas*, vol. 2, p. 461. But by the more recent case of *Williams v. Bosanquet*, 3 Moo. J. B., 500, it has been decided that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for the payment of the rent, though he never occupied or became possessed in fact. This decision of *Williams v. Bosanquet* is founded on the interpretation put upon the language of *Littleton* in the fifty-ninth and sixty-sixth sections of

the Treatise on Tenures—in the former of which that writer remarks: “That it is to be understood that in a lease for years by deed or without deed, there needs no livery of seizin to be made to the lessee, but he may enter when he will by force of the same lease;” and in the latter, “also, if a man letteth land to another for a term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same after the death of the lessor, because the lessee, by force of the lease, hath right presently to have the tenements according to the force of the lease.” And the reason, says Lord Coke, in his commentary upon these sections, is “because the interest of the term doth pass and rest in the lessee before entry, and therefore the death of the lessor cannot divest that which was vested before.” True it is, he says, “that to many purposes he is not tenant for years until he enter, as a release to him is not good to increase his estate before entry.” Co. Litt., 46, b. Again it is said by this commentator that “a release which inures by way of enlarging an estate cannot work without possession, but by this it is not to be understood that the lessee hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini* before entry, he may grant it over, albeit for want of actual possession he is not capable of a release to enlarge his estate.”

Whatever these positions and the qualifications accompanying them may, by different minds, be thought to import, it is manifest from the reasoning and the references of the court in the case of *Williams v. Bosanquet*, that from them have been deduced the doctrine ruled in that case, and which must be regarded as the settled law of the English courts, with respect to the liabilities of assignees of leasehold estates. But clearly as this doctrine may have been established in England, it is very far from having received the uniform sanction of the several courts of this country, nor are we aware that it has been announced as the settled law by this court. Professor Greenleaf, in his edition of Cruise, title 15, Mortgage, §§ 15, 16, p. 111, inclines very decidedly to the doctrine in *Eaton v. Jacques*, Doug., 455. After citing the cases of *Jackson v. Willard*, 4 Johns., 41; of *White v. Bond*, 16 Mass., 400; *Waters v. Stewart*, 1 Caines' Cases, 47; *Cushing v. Hurd*, 4 Pick., 253, ruling the doctrine that a mortgagee out of possession has no interest which can be sold under execution, but that the equity of redemption remaining in the mortgagor is real estate, which may be extended or sold for his debts, and further, that the mortgagee derives no profit from the land until actual entry or other exertion of exclusive ownership, previous to which the mortgagor takes the rents and profits without liability to account, Mr. Greenleaf comes to the following conclusion, namely: “On these grounds it has been held here as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title and interest of the mortgagor, and, therefore, is not to be treated as a complete assignee so as to be chargeable on the real covenants of the assignor.”

In the case of *Astor v. Hoyt*, reported in the 5th of Wendell, 603, decided after the case of *Williams v. Bosanquet*, and in which the latter case was considered and commented upon, the supreme court of New York, upon the principle that the mortgagor is the owner of the property mortgaged against all the world, subject only to the lien of the mortgagee, declare the law to be “that a mortgagee of a term not in possession cannot be considered as an assignee, but if he takes possession of the mortgaged premises he has the estate *cum onere*.” In the case of *Walton v. Cronly's Administrator*, in the 14th of

Wendell, 63, upon the same interpretation of the rights of the mortgagor which was given in the former case, it was ruled that a mortgagee who has not taken possession of the demised premises is not liable for rent, and that the law in this respect is in New York different from what it is in England. It is contended, on behalf of the plaintiff in error, that the doctrine in *Eaton v. Jacques*, and in the several decisions from the state courts in conformity therewith, is inconsistent with that laid down by this court in the cases of *Stelle v. Carroll*, in the 12th of Peters, 201 (DOM. REL., §§ 501-503), and of *Van Ness v. Hyatt*, in the 13th of Peters, 294. With regard to this position it may be remarked that the questions brought directly to the view of the court, and regularly and necessarily passed upon in these cases, did not relate to the rights and responsibilities of the assignee of a term, or to what it was requisite should be done for the completion of the one or the other. Giving every just latitude to these decisions, all that can be said to have been ruled by the former is, that by the common law a wife is not dowable of an equity of redemption, and by the latter that an equitable interest cannot be levied upon by an execution at law. This court, therefore, cannot properly be understood as having, in the cases of *Stelle v. Carroll*, and *Van Ness v. Hyatt*, established any principle which is conclusive upon the grounds of defense set up by the third and fourth pleas of the defendants. Nor do we feel called upon, in the present case, to settle that principle; for let it be supposed that such a principle has been most explicitly ruled by this court, still, that supposition leaves open the inquiry, how far the establishment of such a principle can avail the plaintiffs in the relation in which they stand to the other covenantees in the deed from Coleman. In other words, whether the covenant for repairs, contained in that deed, was not essentially a joint covenant; one in which the interest was joint as to all the grantees, and with respect to which, therefore, no one of them, or other portion less than the whole, could maintain an action?

§ 27. *A covenant with several lessors to keep premises in repair is joint, although the lessors hold in unequal proportions and the rent is reserved to them severally.*

The doctrines upon the subjects of joint and several interests under a deed, and of the necessity or propriety for conformity with remedies for enforcing those interests to the nature of the interests themselves, have been maintained by a course of decision as unbroken and perspicuous, perhaps, as those upon which any other rule or principle can be shown to rest. They will be found to be the doctrines of reason and common sense.

Beginning with *Windham's Case*, 3 Reports, part 5, 7a, 7b, it is said that joint words will be taken respectively and severally, 1. With respect to the several interests of the grantors. 2. In respect of the several interests of the grantees. 3. In respect to that the grant cannot take effect but at several times. 4. In respect to the incapacity and impossibility of the grantees to take jointly. 5. In respect of the cause of the grant or *ratione subjectæ materiæ*. The next case which we will notice is *Slingsby's Case*, in the same volume, 18a, 18b, decided in the exchequer. In this case it was ruled that a covenant with several *et cum quolibet* and *qualibet eorum* is a several covenant, only where there are several interests. Where the interest is joint, the words *cum quolibet et qualibet eorum* are void, and the covenant is joint. In the case of *Eccleston and wife v. Clipsham*, the law is stated that, although a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees. And on the

other hand, if the interest and cause of action be several, the action may be brought by one only. 1 Saunders, 153. The learned annotator upon Sir Edmund Saunders, in his note to the case of *Eccleston v. Clipsham*, has collected a number of cases to this point and others, which go to show that where there are several joint covenantees, and one of them shall sue alone without averring that the others are dead, the defendant may take advantage of the variance at the trial, and that the principle applicable to such a case is different from that which prevails where the action is brought against one of several joint covenantors or obligors who can avail themselves of the irregularity by plea in abatement only. The same rule with regard to the construction of covenants and to the legal rights and position of the parties thereto in courts of law may be seen in the cases of *Anderson v. Martindale*, 1 East, 497; *Withers v. Bircham*, 3 Barn. & Cress., 255; *James v. Emery*, 5 Price, 533.

It remains now to be ascertained how far the parties to the case before us come within the influence of principles so clearly defined, and so uniformly maintained in the construction of covenants and in settling the legal consequences flowing from that interpretation. The instrument on which the plaintiffs instituted their suit was a lease from the plaintiffs and various other persons interested in different proportions of the property demised, and by the terms of which lease rent was reserved and made payable to the several owners of the premises in the proportion of their respective interests. So far as the reservation and payment of rent to the covenantees, according to their several interests, made a part of the lease, the contract was several, and each of the covenantees could sue separately for his portion of the rent expressly reserved to him. But in this same lease there is a covenant between the proprietors and the lessee, that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition; and it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued.

The case of *Foley v. Addenbrooke*, 4 Ad. & Ell. (N. S.), 197. The declaration in covenant stated that Foley and Whitby had demised to Addenbrooke lands and iron mines of one undivided moiety, of which Foley was seized in fee, Addenbrooke covenanting with Foley and Whitby and their heirs to erect and work furnaces and to repair the premises and work the mines; that Foley was dead, and plaintiff, Foley's heir, and breaches were assigned as committed since the death of Foley; that Addenbrooke, and since his death his executors, had not worked the mines effectually, nor repaired the premises, nor left them in repair. To this declaration it was pleaded that Whitby, one of the tenants in common, and one of the covenantees, who was not joined in the action, still

survived. This plea was sustained upon special demurrer, and Lord Denman, in delivering the opinion of the court, says: "In the present case the covenants for breach of which the action is brought are such as to give to the covenantees a joint interest in the performance of them; and the terms of the indenture are such that it seems clear that the covenantees might have maintained a joint action for the breach of any of them. Upon this point the case of *Kitchen v. Buckley*, 1 Lev., 109, is a clear authority; and the case of *Petrie v. Bury*, 3 Barn. & Cress., 353, shows that if the covenantees could sue jointly, they are bound to do so."

The case of *Bradburne v. Botfield*, in the exchequer, reported in the 14th of Meeson & Welsby, 559, was an action of covenant upon a lease by seven different lessors jointly according to their several rights and interests in certain coal mines to the defendant, yielding and paying certain rents to the lessors respectively, and to their respective heirs and assigns according to their several and respective estates, rights and interests in the premises; and the defendant covenanted with all the above parties and with each and every of them, their and each and every of their heirs, executors, administrators and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns respectively, at the end of the term. The declaration then deduced to the plaintiff a title to the moiety of one of the lessors, and alleged as breaches the non-repair of the premises and the improper working of the mines. To this declaration it was pleaded that one of the original lessors who had survived all the other covenantees was still living. It was held, upon demurrer, that the covenants for repairs and for working the mines were in their nature joint and not several, and that the surviving covenantee ought to have brought the action. Baron Parke, who delivered the opinion of the court, thus speaks: "We have looked, since the argument, into the lease now set out on oyer and into all the authorities cited for the plaintiff, and are still of opinion that he cannot recover upon the covenants stated in the declaration. It is impossible to strike out the name of any covenantee, and all the covenantees must, therefore, necessarily sue upon some covenant; and there appear to us to be no covenants in the lease which are of a joint nature, if those declared upon are not, or which would be in gross, if the persons entitled to the legal estate had alone demised; for all relate to and affect the quality of the subject of the demise or to the mode of enjoying of it."

We regard the cases just cited as directly in point, and as conclusive against the claim of the plaintiffs to maintain an action upon the covenant for repairs in the lease to Coleman, apart from and independently of the other covenantees in that lease jointly and inseparably interested in that covenant with the plaintiffs. We therefore approve the judgment of the circuit court, that the plaintiffs take nothing by their writ and declaration, but that the defendants recover against them their costs about their defense sustained as by the said court was adjudged; and we order the said judgment of the circuit court to be affirmed.

UNITED STATES v. BOSTWICK:

(4 Otto, 58-69. 1876.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—This action was brought to recover rent and damages on account of the occupation of certain premises by the United States. The contract under which the premises were occupied was made with Lovett,

trustee of Mrs. Fletcher. Application being made by Gen. Mansfield for a lease of the premises to the United States as a hospital, Lovett, in a note to Gen. Mansfield, stated his terms for the "mansion and lower grounds of Kalamazoo," as follows: "The upper grounds contain about seventy acres, which may be occupied by the quartermaster for horses and wagons, or whatever else may be desired, at the rent of \$100 per month." In a second note he offered to the government, "for the purposes of a hospital," the part of the premises "comprising the house and porter's lodge, together with about thirty acres of land immediately surrounding and including both sides of Rock Creek, bordering the same," for a period of three years, with privilege to the government to renew the lease for three years longer, at \$450 per month. A furnace and stove were to be left in the building for the use of the government, and it was to be stipulated that the trees, shrubbery and grounds should be strictly protected, "and any unnecessary injury to the same to be compensated for by the government; the buildings to be kept in repair by the government, and to be left in as good repair as ordinary wear and tear will permit." Also that the government would repair fences already destroyed by the troops.

Subsequently Gen. Mansfield sent the following note to Lovett: "As soon as vacated, within two weeks the United States will hire the whole property of Thomas R. Lovett, trustee of Mr. Charles F. Fletcher, etc., above, on the following terms, inclusive of his upper lot, and all his land and privileges, for \$500 per month, for the period of one year, with the privilege of keeping it at least three years, if desirable for all purposes." The premises were occupied from August 23, 1861, to September 30, 1867. From August, 1861, to June, 1862, rent was paid at the rate of \$500 per month; from the latter date to February, 1865, \$250; and from 1865 to September, 1867, \$200 per month, a receipt being given for each monthly payment.

The damages claimed were on account of the destruction of the main house by fire, destruction of fences, walls, trees, shrubbery, etc., and use of stone and gravel.

§ 28. *Construction of the correspondence in this case as to the terms of the contract.*

Opinion by WARRE, C. J.

In the determination of this cause, it is necessary at the outset to ascertain definitely the terms of the contract under which the United States occupied the property of the petitioner. On the one hand it is claimed that the proposition of Mr. Lovett was accepted by General Mansfield with modifications, and that all the stipulations suggested by him are included in the contract as finally entered into, unless modified or rejected in terms by the note of General Mansfield. On the other hand it is contended by the United States that the note of General Mansfield, instead of being an acceptance of the proposition, was a rejection of it, with an offer of new terms, which, when acceded to by Mr. Lovett, embraced all there was of the contract as made. The latter, we think, is the true construction of the correspondence. We know that, when a contract is entered into by correspondence, the whole correspondence must be considered in determining what the parties have agreed to; but we also know that both parties must assent to the proposed agreement before either is bound by it. Here General Mansfield has nowhere indicated a willingness to accept any of the terms offered him, but, rejecting all, has made a new offer of his own. No reference whatever is made by him to any of the special stipulations suggested by Mr. Lovett. All these are laid aside, and he states the terms

upon which the United States will hire the property. The words "as above," where they occur in his note, are used to designate the property, not to extend the offer. In short, Mr. Lovett proposed his terms, and General Mansfield his. Mansfield's were accepted, but Lovett's were not.

This being the case, the contract is one by which Mr. Lovett agreed to let, and the United States to hire, the premises described for the term of one year, with the privilege of three, at a rent of \$500 a month, and without restriction as to the use to which the property might be put. The United States agree to nothing in express terms, except to pay rent and hold for one year.

§ 29. *Implied covenant in every lease to so use the property as not unnecessarily to injure it.*

But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful and negligent conduct of the lessee." Com. Land. & Ten., 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford v. Dunnett*, 7 M. & W., 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. *Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 Marsh., 569.

There are in this contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to use the property for any and all purposes, but were bound to so conduct themselves in such use as not to cause any unnecessary injury. Whatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant, while using the property, will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim *sic utere tuo ut alienum non lœdas*. If he fails in this, he violates his contract, and must respond accordingly.

§ 30. *Liabilities of United States in contracting with citizens.*

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon.

§ 31. *Petitioner entitled to rent at \$500 per month to end of first year.*

Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record. 1. As to rent. The United States hired for a year absolutely, at the agreed rent of \$500 a month, and occupied during the whole of that term. They therefore, by their agreement, were expressly bound to pay rent at that rate for the whole of the year. This they have paid in full to June 30; but after that, until the end of the year, August 23, 1862, their payments have been only at the rate of \$250 a month. Payment by a debtor of a part of his debt is not a satisfaction of

the whole, except it be made and accepted upon some new consideration. It is not found that there was any new consideration in this case. All that appears is, that an account was made out for the rent from July 1 to September 30, at the new rate, and that this account was receipted by Mr. Lovett after payment. Upon this finding, therefore, in the absence of anything more showing that the reduction in the rent of the first year was part of the agreement to continue the lease beyond the year upon new terms, the petitioner will be entitled to judgment for rent at the rate of \$250 a month, from June 30 to August 23, 1862, that being the balance remaining after deducting payments made.

§ 32. — *acceptance of reduced rates after the first year.*

After the end of the first year the case is different. The United States were not bound absolutely to keep the premises for a longer term than one year. After that they could make new terms or leave. The acceptance by Mr. Lovett of the reduced rates from that time, without objection, is conclusive evidence of his assent to a modification of the original agreement in this particular, in consideration of the continued occupancy by the United States. Having thus secured the occupancy he cannot now object to the agreement under which it was obtained.

§ 33. *Where premises were let to the United States for all purposes, no damages can be recovered because of their use as a small-pox hospital.*

2. As to the use for a small-pox hospital. Mr. Lovett originally offered the property to the government "for the purposes of a hospital;" and all the receipts for the rent expressly state that the property was being so occupied. No objection to such an occupancy was ever made; and, if there were nothing more, the presumption would be that the lessor expected the property was to be used for any and all hospital purposes that the necessities of the government for the time being might require. But the note of General Mansfield is broad enough to cover such an occupancy, for he expressly states that the hiring is to be "for all purposes." No recovery can be had upon this specification of claim.

§ 34. *Where there is no express agreement to repair, the tenant is not answerable for accidental damages, nor is he bound to rebuild if the buildings are accidentally burned down or otherwise destroyed.*

3. As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account.

§ 35. *Damages done to property by the army and navy engaged in the suppression of the rebellion, before such property was rented by the United States, are not recoverable in the court of claims.*

4. The destruction of the trees and fences, and the digging and carrying away of gravel and stone. Whatever injury was done to the property during the occupation previous to the agreement for the lease cannot be recovered for in this action. Mr. Lovett's proposition included an undertaking on the

part of the United States to make good this loss; but his proposition was not accepted, and the case stands as if it had never been made. The obligations of the United States under the lease, as to the preservation of the property, relate only to the condition of the premises as it was when the term commenced. All damage done before that is clearly "damages . . . by the army and navy . . . engaged in the suppression of the rebellion," and on that account not recoverable in the court of claims. 13 Stat., 381. But damage after the lease commenced, and while the United States were actually in possession under it, occupies a different position. That comes within the contract by which the rights of the parties in this action are to be determined. As has been seen, that does not bind the United States to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use. It binds them not to commit waste or suffer it to be committed. If they fail in this they fail in the performance of their contract, and are answerable for that in the court of claims, which has jurisdiction of "all claims founded upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." Rev. Stat., § 1059; 10 Stat., 612, § 1. If there had been in this lease an express agreement to repair, certainly it could not have been successfully claimed that the court of claims would not have had jurisdiction to award damages for a failure to rebuild after the fire, even though the fire was caused by the soldiers while in the hospital for treatment. But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the court of claims. All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract.

§ 36. *The destruction of ornamental trees, the tearing down of fences and walls, and the quarrying of stone and digging of gravel by the tenant is voluntary waste, within the implied agreement not to commit waste, and the tenant is liable therefor.*

It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the court of claims can award compensation in this action. The amount of this damage has not been found.

5. The account, as stated in the quartermaster-general's office. This does not conclude the United States. It was a mere adjustment of the accounts by one of the bureaus in one of the departments of the government, rejected by the accounting officers of the treasury, and never paid. Certainly this can have no binding effect upon the United States.

The judgment must be reversed, and the cause remanded, with instructions to render judgment against the United States for the rent of the premises from June 30 to August 23, 1862, at the rate of \$250 per month, and for the damages done to the property other than the destruction of the house by fire during the occupation of the United States under their lease, except to the

extent that the same necessarily resulted from the use of the premises by the soldiers of the army of the United States for the purposes of a hospital and camp-ground; and it is so ordered. (a)

BEALL v. WHITE.

(4 Otto, 382-391. 1876.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Landlords leasing real property in this District have a tacit lien upon such of the personal chattels of the tenant upon the premises as are subject to execution for debt, commencing with the tenancy, and continuing for three months after the rent is due, and until the termination of any action for such rent brought within said three months. 14 Stat., 404; *Fowler v. Rapley*, 15 Wall., 328; *Webb v. Sharp*, 13 id., 14.

Sufficient appears to show that the executors of Alpheus Middleton, deceased, and Benjamin Beall, the owner of the other undivided half, on the 5th of March, 1867, leased the hotel at the corner of Pennsylvania avenue and Sixth street west, then known as the Clarendon Hotel, to George W. Bunker and William H. Crosby, for the term of five years from the 1st day of April next ensuing, at the yearly rent of \$4,000, payable in monthly instalments the last day of each month, with the proviso that if the rent or any part thereof shall be in arrear and unpaid for the space of thirty days, the tenancy, upon notice thereof being given in writing to the lessees, shall cease and determine, and the same shall be and become a tenancy at will, determinable as prescribed in the act of congress.

Covenants were also contained in the lease by both parties. On the part of lessees, for the payment of rent during the term and in the mode prescribed; that they would not let or sublet the demised premises without the written consent of the lessors; and for the peaceful surrender of the premises at the end of the term or additional term. Reciprocal covenants were also made by the lessors for quiet enjoyment, for the renewal of the lease for another term of five years, if the lessees made written application for the same within the period therein specified.

Under that instrument the lessees entered into possession of the premises, purchased necessary furniture, and commenced the business of hotel-keeping, the name of the house being changed to Bunker's Avenue Hotel. At the date of the lease Thomas M. Plowman was a silent partner with the lessees in the business; and it appears that Crosby, on the 2d of October in the following year, sold and assigned his interest in the lease and furniture to Bunker and Plowman, his copartners.

Negotiations took place for the enlargement of the hotel; and, in December following, an adjoining tenement belonging to Benjamin Beall, in his own right, was leased to Bunker & Plowman, at the yearly rent of \$1,300, payable monthly, the same having previously been altered and remodeled for the purpose at great expense, and was then fitted up with the necessary furniture.

Five days after the commencement of the lease, to wit, April 6, in the same year, the lessees gave a deed of trust upon all the furniture then in the hotel

to Orestes B. Dodge, trustee, to secure two notes of even date with the deed, each for \$1,250, payable in nine and twelve months. When William H. Crosby sold and assigned his interest, Bunker & Plowman on the same day, to wit, October 2d, in the same year, gave a deed of trust to Samuel L. Phillips, trustee, upon all the furniture then in the hotel and all additions to the same, and all furniture to be placed in the Beall tenement, then being remodeled, and also upon the demised term and any further term the grantors may obtain in the Beall property, to secure two notes of even date, each for the sum of \$3,500, payable in six and twelve months, in favor of William H. Crosby, for his interest in the lease and furniture.

Bunker & Plowman, on the 17th of April following, conveyed all their leasehold interest in the tenements, then called the St. James Hotel, together with all the furniture therein, to Samuel L. Phillips, trustee, to secure a continuing credit given by Beall & Baker to the grantors, in the amount of \$5,000, to continue for two years. On the 20th of December in the same year the same grantors gave another deed of trust to Elias E. White, trustee, to secure a further indebtedness to Beall & Baker in the sum of \$3,044.77, as appears by the answer.

Two of the notes secured by the deeds of trust, each payable in twelve months, are claimed by the Freedman's Savings and Trust Company, one being secured in the first trust deed and the other in the second, both notes having been taken by the bank when overdue. Mention should also be made that the same grantors, on the 10th of April, two years later, assigned their leasehold interest and all the furniture in the hotel to John Spicer, and, late in the same month, put him in possession, the original lessors refusing to recognize him as tenant. Rent was subsequently paid, but was received and receipted as due from Bunker & Plowman.

Suits in attachment on two of the notes were brought for rent on the 29th of August in the same year, and two other similar suits were instituted for similar causes near the close of the year, in which chattels upon the premises, including both tenements, were seized, and judgments of condemnation were duly rendered.

Enough appears to show that Bunker & Plowman were indebted to Beall & Baker, under the deeds of trust executed for their benefit, in the sum of \$10,000, and that it was at their instance that the trustees proceeded to enforce the deeds; that the property was sold by the trustees under the several deeds of trust, with the consent of Spicer; and that the trustees then filed their bill of interpleader against Beall and Beall & Baker, and the Freedman's Savings and Trust Company, for the distribution of the fund.

Process was served, and the respondents appeared and filed an answer. Proofs were taken, the parties heard, and the court entered a decree that the deeds of trust are entitled to priority of satisfaction out of the fund in the hands of the complainants as against the rents to the landlord. Such being the final decree in the court of appeal, Beall & Baker, by special leave, appealed to this court, and assign for error the decree of the court below, adjudging that the deeds of trust are entitled to priority of payment as against the lien of the landlord.

Priority in favor of the first deed of trust cannot be claimed, unless the proposition of appellees can be sustained, that the first tenancy ended when William H. Crosby, with the consent of the lessors, sold and assigned his in-

terest in the lease and furniture to Bunker & Plowman, or when the latter in turn assigned their leasehold interest in the demised premises and the furniture in the hotel to John Spicer. Suppose the original tenancy was unaffected by those events, it follows that the claim in favor of the first deed of trust is unfounded, as the record shows that the tenancy commenced before the deed was executed, and the recitals in the deeds showed that the chattels were upon the premises.

§ 37. *Landlord's lien.*

Without more, these remarks are sufficient to show that the court below erred in that regard, if the original contract of lease continued in force unaffected by the described assignments. Grant that, and it follows that the decree under review is also erroneous in respect to the claim made in favor of the other deed of trust, for the same reason, that the tenancy commenced eighteen months before the deed was executed. Nor can the appellees derive any benefit from the fact that the deed purports also to convey chattels to be acquired in the future and placed in the hotel. Liens of the kind, arising under the act of congress, attach at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought on to the premises. Statutory liens have, without possession, the same operation and efficacy that existed in common law liens where the possession was delivered. Personal chattels on the premises, sold in the ordinary course of trade, without knowledge of the lien, are not subject to its operation, or, in other words, the lien in respect to such sales, where the goods are removed from the premises, is displaced, and the purchaser takes a perfect title to the property discharged of the lien. *Webb v. Marshall*, 13 Wall., 15; *Grant v. Whitwell*, 9 Ia., 153; *Doane v. Garretson*, 24 id., 351; *Marr v. Sheffner*, 2 East, 523; *Burton v. Smith*, 13 Pet., 483; *Fowler v. Rapley*, 15 Wall., 336.

§ 38. *Courts of equity in certain cases give effect to a mortgage of property to be acquired subsequently, but only where no rule of law is infringed, and the rights of third parties are not prejudiced.*

Beyond question, the remarks made are sufficient to show that the lien of the landlord, so far as respects the chattels on the premises, is entitled to priority over the deeds of trust, unless the proposition of the appellees, that the statutory lien was displaced by one or both of the subsequent assignments by the lessees.

Before examining that question, it is proper to consider to what extent, if at all, the rights of the parties are affected by the terms of the second deed of trust, which purports to convey property subsequently acquired by the grantors and placed on the demised premises. Courts of equity will in certain cases give effect to a mortgage of property to be acquired subsequently, where no rule of law is infringed and the rights of third persons are not prejudiced. *Pennock v. Coe*, 23 How., 117 (Conv., §§ 1305-9).

Grants or conveyances of the kind may, in certain cases, be valid, subject to those conditions, or, to speak more accurately, the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced. *Story*, Eq. Jur. (9th ed.), § 1040; *Dunham v. Railway Company*, 1 Wall., 254 (Conv., §§ 1557-58); *United States v. New Orleans Railroad*, 12 id., 362 (Conv., §§ 1310-14).

Decided cases may be found where the rule, as stated in the preceding citations, is greatly qualified, and others where it is expressly denied, if applied in the ordinary business transactions. *Otis v. Sill*, 9 Barb., 111; *Mogg v. Baker*, 3 M. & W., 198; *Winslow v. Insurance Company*, 4 Met., 316; *Jones v. Richardson*, 10 id., 481; *Lunt v. Thornton*, 1 Man., Gr. & Sc., 385.

Were it necessary to reconcile the decisions upon the subject, the effort would be involved in difficulty; but it is not necessary to make the attempt in this case, as the court is unhesitatingly of the opinion that the deeds of trust in that regard present no legal obstacle to the claim of the appellants. Repeated decisions have settled the rule that the lien of the landlord attaches at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are placed on the demised premises. *Fowler v. Rapley*, 15 Wall., 328; *Webb v. Sharp*, 13 id., 14.

Decided cases everywhere admit that rule; and yet the second deed of trust in question provided that the grantee should take not only all the chattels on the premises at the date of the instrument, but also all such as the tenants might have on the premises in substitution, renewal, or addition to those contained therein, and all they might have during the continuance of the term in and about the addition which was then erecting to the hotel, and which was not leased to the tenants in possession under the lease until the month of December, 1868, as appears both by the bill of complaint and the answer. Suffice it to say that the terms of the deed of trust are in that regard utterly inconsistent with the statutory rights of the landlord, and must give place to the superior claim of the appellants.

Concede all that, and still it is insisted by the appellees that the statutory lien for rent has been lost, because it was not seasonably enforced; and they assign two reasons for the conclusion: 1. That the first term ended and the second began when William H. Crosby retired and Plowman was substituted in his place, with the consent of the lessors. 2. That the second term ended when Bunker & Plowman in their turn left the premises, and that the third term commenced when Spicer, with the approbation of the lessors, entered into possession of the hotel and became its proprietor.

Changes of the kind were made; and the appellees submit the proposition that each one of the same effected by operation of law a surrender of the previous term, and created both a new tenancy and a new term. Two things which are unlike should be separately considered; and for that reason the alleged surrenders of the term will be separately examined.

Both the pleadings and evidence show that Plowman, though not named in the original lease, was in fact a silent partner, and that he was interested in the contract; and the evidence also shows that the arrangement that Crosby should retire and that Plowman should take his place was a matter which the parties adjusted between themselves, doubtless with the consent of the senior partner named in the lease. All three were originally interested, each having a third interest; and the reasonable inference from the evidence is, that the other two, when Crosby retired, became joint owners of the entire interest conveyed by the lease. Evidence to show that the lessors, other than Benjamin Beall, were ever consulted is entirely wanting; and there is neither fact nor circumstance in the case to show that the parties, or any one of them, ever for a moment supposed that the term was surrendered, or that a new term was created by the transaction. *Whitney v. Myers*, 1 Duer, 266.

§ 39. *A surrender of a lease is the yielding up the estate to the landlord so as to extinguish it by mutual consent, and may be either by express words by which such intention is manifested, or by some act which implies that both parties have agreed to consider the surrender as made.*

No new writings were executed, nor was any change made in the management of the property, except that one party interested retired, and another, who had an equal interest in the adventure, joined with the senior partner in conducting the business, and contributed his proportion of the means to pay the past and accruing rent. 1 Washb. Real Prop. (4th ed.), 549. Rent was subsequently paid by the tenant in possession; but there is no evidence in the case which has the least tendency to show that there was any surrender in fact of the term, or that any one of the parties ever had any such intention. *Lyon v. Reed*, 13 M. & W., 285. Indeed, it is not even suggested that there was any surrender in fact.

What the appellees suggest is, that these acts of the parties proved, constitute a surrender by operation of law, even though such was not their intention. Such a conclusion may, in certain cases, arise by operation of law, as where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist.

Text-writers agree that a surrender is the yielding up the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words, by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, when the parties without express surrender do some act which implies that they have both agreed to consider the surrender as made. *Taylor on Land. & Ten.* (6th ed.), 392; *Woodfall on Land. & Ten.* (9th ed.), 267.

Decided cases to the same effect are very numerous, and they show that the evidence in this case is not sufficient to warrant the conclusion that there was any surrender of the term when Crosby retired and Plowman took his place. *Schieffelen v. Carpenter*, 15 Wend., 404; *Field v. Mills*, 33 N. J., 259; *Boardman v. Wilson*, Law Rep., 4 C. B., 57; *Bedford v. Terhune*, 30 N. Y., 458.

Attempt is next made to maintain the proposition that the term under the original lease terminated when Bunker and Plowman assigned or agreed to assign all their interest in the lease and furniture of the hotel to John Spicer, as alleged in the answer. Satisfactory proof is exhibited that they agreed to make the assignment, and it is certain he went into possession of the premises as proprietor; and the theory of the appellees is, that Benjamin Beall assented to the transfer of the lease and the personal chattels, and that he agreed to accept the assignee as tenant of the demised premises. Testimony to that effect was given by several witnesses examined by the appellees, as exhibited in the record.

Opposed to that is the testimony of Benjamin Beall, who was called and examined in behalf of the appellants. He testifies that he never consented to the substitution. Instead of that, his testimony is that he peremptorily refused to recognize Spicer as tenant when he called upon him and made request to that effect; that the interview was before any assignment had been completed with the tenants in possession, and that he then informed Spicer that he would give him the benefit of an extension of the lease.

Full proof is also exhibited in the record that the owners of the hotel and furniture, on the 28th of April, 1871, gave written notice to the lessees in pos-

session that they would, on the following day, take possession of the furniture and fixtures of the hotel, and that the marshal had been directed to attach the same. From that notice it also appears that they referred to a statement in a morning paper, that the hotel had changed hands, and stated that the change was not authorized by them, and that they would not sanction any such arrangement.

Nothing is wanted to show that the lessees knew that the acting lessor would not consent to any surrender of the term. Rent, it is admitted, was subsequently paid to him by Spicer; but the evidence shows that he receipted for it to the lessees who made the assignment, but without his consent. *Amory v. Kannoffsky*, 117 Mass., 354.

Taken as a whole, the evidence satisfies the court that there was no actual surrender of the term, and that the acts of the lessors, when properly understood, do not tend to prove the theory of the appellees, that there was any surrender by operation of law, within the meaning of that phrase as expounded by the decided cases. *Phene v. Popplewall*, 12 C. B., N. S., 334.

Evidence to support such a theory, so far as respects all of the owners of the property and furniture, except one, is entirely wanting, as no application was ever made to any other one of the owners to give their consent to the arrangement, nor was any evidence introduced to show that they had knowledge that anything of the kind was proposed.

Sufficient appears to show not only that Beall knew what the proposal was, but that he also knew what the parties, as between themselves, carried into effect. Much conflict exists in the evidence as to whether he consented to it or not; but, in view of the written notice given to the lessees before the change of proprietors was carried into effect, the better opinion is, that the change was made without having secured his consent.

Decree reversed, and cause remanded with directions to enter a decree adjudging that the liens of the landlord have priority over the deeds of trust.

STOTT v. RUTHERFORD.

(2 Otto, 107-111. 1875.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an action of covenant brought upon an indenture of lease executed by the plaintiffs in error, and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant pleaded *non est factum*, and satisfaction of the claim of the plaintiffs by payment. Upon the trial, several bills of exception were taken by the defendant. They show that he made numerous points, all of which were overruled by the court. Only one of them requires consideration. He objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises, and that the instrument was, therefore, a nullity. The court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiff. The defendant moved for a new trial, and the case was heard by the full court in general term. That court ordered a judgment to be entered for the defendant, *non obstante veredicto*. The plaintiffs have brought the case before this court for review. The judg-

ment of the court below proceeded solely upon the ground of the invalidity of the lease, and that subject is the only one argued here.

§ 40. *The words "grant" and "demise" in a lease for years create an implied warranty and covenant for quiet enjoyment.*

The lease created a term beginning on the 1st day of February, 1864, and to continue five years. It recites that the lessors, in making the lease, "were acting as a church-extension committee by authority and on behalf of the general assembly of the Presbyterian Church, Old School." The leasehold premises are described as "being lot number four and part of lot number five," etc., "as now held by the parties of the first part," etc. The lessee covenants, among other things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations heréin contained, whenever this lease shall terminate."

It was provided that the lessors might terminate the lease for non-payment of rent, or otherwise, at their option, by giving the requisite notice. The language of the grant was, "have granted, demised, and to farm let." The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. *Burney v. Keith*, 4 Wend., 502; *Grannis v. Clark*, 8 Cow., 36; *Young v. Hargrave's Adm'r*, 7 Ohio, pt. 2, 68.

The declaration avers "that, by virtue of which said indenture, the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and was possessed thereof until about the 1st day of October, 1869, when he vacated such possession and occupancy, and the term of said lease was determined." This is not denied by the defendant's pleas, and is, therefore, according to a settled rule of the law of pleading, to be taken as admitted. The lessors executed the lease in their own names, and not as agents. They demised the premises in the same way. The rent was stipulated to be paid to them in their own right. The covenants of the lessee were all to them personally. If there had been a breach of the covenants of title and for quiet enjoyment, they would have been personally liable for the damages. The lessee entered into possession, and remained in possession, enjoying that possession as long as he chose to do so. He had, on his part, the full benefit of the contract.

When called upon to pay and perform as he had covenanted to do, he answered that the lessors had no title, and that he was in no wise responsible to them. In *Laws v. Purser*, 6 Ell. & Bl., 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. After having done so, he refused to pay the royalty. The patentee sued him. He pleaded "that the letters-patent were void, and that he had a right to make and sell the article without the plaintiff's permission." The plaintiff demurred. The court said, "It would be monstrous if the defendant, after such an agreement acted upon, could on this ground refuse payment." The demurrer was sustained.

§ 41. *Effect of recital in lease as to character in which lessors acted.*

There are two answers to the defense relied upon in this case. The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust to enable them the better to discharge the duties touching the property with which they were clothed. Every reasonable presumption is to be made in favor of the validity of the instrument which they

executed. The act done presupposes the prior act necessary to give it validity. It is not stated in the bill of exceptions that the lessors had no paper title, but "that they possessed no estate whatever in said lands except such as pertained to the office of such committee, and have no estate therein in their individual capacity." The legal title in trust would be just such an estate as is here exceptionally and negatively indicated. We are all of the opinion that it is a fair inference from this language that the lessors had such an estate, or some other title in trust, sufficient to warrant their giving the lease and to render it valid.

We think the principle, that the lessee cannot dispute the title of his-lessor, also applies. We see nothing to take the case out of this long-settled and salutary rule. *Williams v. Mayor, etc.*, 6 H. & J., 529; *Stewart v. Roderick*, 4 W. & S., 189; *Coburn v. Palmer*, 8 Cush., 627. The rule applies with peculiar force where the lessor was in possession, and transferred that possession upon his faith in the validity of the lease to the lessee. *Taylor's Land. and Ten.*, sec. 707.

Whether the testimony set forth in the bill of exceptions, as to the title of the plaintiffs in error, was competent, is a question not raised before us, and upon which we therefore express no opinion. According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice and the law. Judgment reversed, and cause remanded with directions to enter a judgment upon the verdict in favor of the plaintiffs in error. (a)

TSCHEIDER v. BIDDLE.

(Circuit Court for Missouri: 4 Dillon, 55-64. 1877.)

STATEMENT OF FACTS.—Mrs. Biddle brought an action at law for rent of certain premises in St. Louis occupied by Tscheider and others. The defense set up a contract, which is more fully set out in this bill in equity, which is filed by the defendants in the action at law. In this bill they allege that they were in possession of the property in question by virtue of a covenant with Mrs. Biddle, by which the land was leased to them for ten years at a stipulated rent, and it was agreed that at the end of the ten years the rent for the next ten years should be fixed by arbitrators appointed by the two parties, and that the lease should be renewed in this manner every ten years for five hundred years. The bill charged that Mrs. Biddle had refused to comply with her engagements embodied in this contract, and evaded them by appointing incompetent persons as arbitrators, so that the renewal of the lease at the proper time, when the first ten years expired, became impracticable. The prayer of the bill was that the rent be assessed by the court, and the lease ordered to be renewed, and that the suit at law of Mrs. Biddle against the complainants be enjoined. There was a demurrer to the bill.

Opinion by DILLON, J.

On the demurrer the averments of the bill in equity are admitted on the record. The lessees obtained a lease for ten years with the right to periodical

(a) Reversing *Stott v. Rutherford*, *1 *MacArth.*, 7.

renewals for five hundred years, the rental to be ascertained by assessors in the manner provided in the lease. The lessees have entered into possession, and, on the faith of the efficiency of the covenant to renew, have made improvements on the demised premises costing over \$100,000. At the end of ten years the lessors, instead of complying in good faith with the covenant as to renewal, act, as it is alleged, in bad faith and fraudulently, to prevent a valuation and a renewal. Hence no renewal has been had. The lessees are still in possession. The lessors bring an action at law in this court for the use and occupation of the premises—of the whole premises, and not simply of the premises aside from the improvements made by the lessees. On a demurrer to the answer at law, we held that the unexecuted provisions of the lease as to renewal, although attributable to the fault of the lessors, was no answer to the action; and this holding was in accordance with the decisions of the supreme court of Missouri, in a case which arose under a similar lease. *Finney v. Cist*, 34 Mo., 302, and its sequel, *Garnhart v. Finney*, 40 Mo., 449. And see, also, *Biddle v. Ramsey*, 52 Mo., 153. And if, under such circumstances, the lessor can recover at law for use and occupation, he could recover the possession in ejectment if he had seen fit to adopt that remedy. The lessees being without fault, and willing to comply with the lease, what are their rights and remedies?

They may, it is said, sue the lessor at law for a breach of the covenant in respect to renewals, and recover damages. This was so held in *Garnhart v. Finney*, *supra*, and has been adjudged in other cases. *Greason v. Keteltas*, 17 N. Y., 491; *Hopkins v. Gilman*, 22 Wis., 476.

§ 42. *A covenant to renew a lease at a fair valuation may be specifically enforced.*

It will be observed that it is so held, although the obligation to renew does not become consummate until the valuation is fixed, and such valuation is to be ascertained by arbitrators, who had never been appointed or acted. But assuming that, on the facts stated in the present bill, the lessees might sue the lessors for damages, is this their only remedy? If so, it is obvious that the law is so defective as to shock the sense of justice, and that it rewards the party who fraudulently seeks to evade his obligation at the expense of the party who has trusted the covenants of the lessor and expended large sums of money on the faith that he would observe those covenants. If this lease contained a simple covenant to renew at a fair valuation, such a covenant, it is admitted, could be specifically enforced, and the court would settle the valuation or rental to be paid. The lessee in such a case is not confined to an action at law for damages, but may go into equity for a specific execution of the covenant to renew. This is settled law. Is the right, the equity, to a renewal in these lessees any the less cogent and persuasive because they have provided the means for ascertaining the rental on the renewal, and the lessor purposely and fraudulently thwarts the execution of those means?

§ 43. *Where the lessor fraudulently prevents the valuation prescribed by a lease as a condition precedent to its renewal from being made, a court of equity will intervene.*

As an original proposition, after much reflection, I should say that it was in accordance with sound principle to hold that if the lessor were guilty of the fraudulent conduct charged in the bill, he subjected his conscience to be laid hold of by the chancellor, who would say to him, "You have agreed to renew—the lessee has expended large sums of money on the faith of that agree-

ment — you refuse to execute the provisions for the fixing of the valuation by arbitrators — you cannot, therefore, object if the court, with the concurrence of the lessee, proceeds to fix the valuation under the provisions of the lease." Some adjudications, however, have been made, with which it might not be easy to reconcile the view just stated. *Milnes v. Gery*, 14 Vesey, 400; *Greason v. Keteltas*, 17 N. Y., 491; *Hopkins v. Gilman*, 22 Wis., 476. These cases proceed upon the notion that such provisions as those in this lease are in effect an agreement to arbitrate, and that agreements to arbitrate will not be specifically enforced in equity. I agree to the reasonableness of the doctrine that a court of equity will not enforce a specific performance of an agreement to arbitrate. The grounds of this doctrine and the cases in its support are given by Mr. Justice Story, in *Tobey v. County of Bristol*, 3 Story, 800 (ARBITRATION, §§ 63-71). To refuse judicially to enforce an agreement to arbitrate occasions no injustice, for the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators. So when the refusal of a court to appoint or compel the appointment of arbitrators, or substitute its judgment for the judgment of arbitrators, will occasion no injury which cannot be fully and adequately redressed by an action at law, as in the ordinary case of an agreement to sell, it is entirely consistent with sound principle for a court of equity to decline to interfere.

§ 44. *Although as a rule a court will not compel a specific performance of an agreement to arbitrate, where bad faith is imputed, and gross injustice will follow a refusal, the principle does not apply. Cases cited and distinguished.*

In this view I can agree to the actual decision on the facts of the cause, of Sir William Grant, the master of the rolls, in the leading case in *Milnes v. Gery*, 14 Vesey, 400, without assenting to the reasoning of that great judge that equity is absolutely disabled from interfering to compel a specific execution unless the price of the property has been ascertained in the prescribed mode. That was the case of an agreement to sell. The parties could be placed *in statu quo*. No *mala fides* was imputed, and the failure of arbitrators to agree was not owing to bad faith; under such circumstances the refusal of the court to appoint its own master to fix upon the price can be well justified. But such a case as that made by the present bill is entirely different; here the parties cannot be put *in statu quo* — here *mala fides* is imputed — here a remedy at law for damages does not satisfy the covenant or the demands of enlightened justice. It is a well settled principle that courts will not compel the specific execution of a mere agreement to arbitrate; but I am strongly convinced it is erroneous to apply that principle to cases like the present, where it would result in manifest and gross injustice. The cases somewhat like the one before us (*Greason v. Keteltas*, 17 N. Y., 491; *Hopkins v. Gilman*, 22 Wis., 476), while asserting that the lessces have a remedy at law, but none in equity, for specific performance, deserve, I think, further consideration before assenting to their entire correctness.

In *Greason v. Keteltas* the refusal of the lessor to appoint arbitrators or take steps for an appraisal was held to subject him to liability at law for the value of the building on a valuation fixed by the court, although the covenant was that this valuation was to be fixed by arbitrators. If such refusal on the part of the lessor is a breach of the covenant so as to render him liable for damages or to pay for the improvement on a judicial valuation, why is it not such a breach of duty as to justify a court of equity, when substantial justice requires it, to compel the lessor either to make the appointment or to make

one for him, or otherwise judicially ascertain the valuation? Where is the equity of the party who purposely and fraudulently seeks to evade the contract on his part to insist that a valuation by arbitrators is a *sine qua non* to equitable relief? Is he not in such a case estopped to set up his own wrong and fraud in defense to the relief to which his adversary is otherwise clearly entitled?

§ 45. *Upon what the right to a specific performance depends.*

I suggest these views that attention may be directed to this subject, and not because they are absolutely essential in this stage of the cause to support the present bill. I admit that in specific performance the court must enforce the contract made by the parties, and that it cannot ordinarily modify this contract or make another and enforce that; but this sound and necessary principle does not preclude the operation of the principle of estoppel where this principle is necessary in order to do justice. Where the covenant to renew on an appraisal by third persons has, as in this case, been acted on by the lessee, and where the failure to secure a renewal will work an injustice for which an action for damages is not a complete remedy, and where the lessor fraudulently thwarts the appraisal, why is he not estopped to set up the want of an appraisal caused by himself as a bar to appropriate equitable relief?

The leading English decisions, from *Mitchell v. Harris*, 2 Vesey, 129, to *Scott v. Avery*, 5 House of Lords Cases, 811, and *Dawson v. Lord Otto Fitzgerald*, 9 Law Rep. Exch., 7; S. C., 3 Cent. Law Jour., 477, have been critically examined, and, when thoroughly understood, I do not think that in their essential facts they are in conflict with the above views. And the right to some equitable relief in cases like the present is directly decided by the supreme court of Missouri under a lease exactly similar to the one before us, in *Biddle v. Ramsey*, 52 Mo., 159, and is also recognized by the supreme court of Wisconsin in the case of *Hopkins v. Gilman*, before cited.

In this connection it may be useful to refer to a provision in the English common law procedure act of 1851, the eleventh section whereof provides that "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future difference between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the party or parties, for any of them, or against any person or persons claiming through or under him or them, in respect to the matters so agreed to be referred or any of them, it shall be lawful for the court in which such action or suit is brought, or a judge thereof, on application by the defendant or defendants or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was at the time of bringing such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms, as to costs and otherwise, as to such court or judge may seem fit; provided always that any such order may at any time afterwards be discharged or varied as justice may require." 17 and 18 Victoria, ch. 125, sec. 11; *Daniell's Ch. Pr.* (4th Am. ed.), vol. 2, p. 1861.

It may be true, as suggested by the defendant's counsel, that the statute had

its origin in the doctrine of the cases in the English courts before referred to, which, to a large extent, nullified agreements to refer matters in dispute to arbitrators; but if so, it shows that the cases which were relied upon by defendant's counsel were productive of such results that this enactment was deemed expedient. However it may be in England, I see no reason for the position that such a statute in this country is necessary in order to justify a court of equity in making by analogy such a rule or order as therein provided for when justice requires it and no good reason exists for not making it.

A rule or order will accordingly be entered in this case staying the prosecution of the law action for rent until the further order of the court. If the law action would settle the amount of rental on a renewal, there might be good reason for allowing it to proceed; but it will not have that effect. Such a rule or order does not contravene the principle contended for by the defendant, that before there can be a decree for renewal the rental must be fixed by arbitrators and cannot be fixed by the court, since the object of the rule or order is to compel the defendant (lessor) to himself appoint the assessor, who is to represent him. If he appoints an impartial person, without instructions, and he is met with an impartial appointment by the lessee, it is probable that an agreement as to the rental will be reached. The defendant is, of course, at liberty to answer the bill and contest its averments. When the answer is filed and the proofs are in, the court can discharge or vary the order here made, as justice may require. The demurrer to the bill is accordingly disallowed, and the rule or order, as above suggested in respect to the law action, will be entered.

WILDMAN v. TAYLOR.

(District Court for Connecticut: 4 Benedict, 42-53. 1870.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This was a bill in equity, brought by the assignee to have settled and determined conflicting claims to various portions of the property pertaining to the bankrupt estate. All the parties to the bill are residents of this state, except James Benedict and Ezra G. Benedict, who reside at Albany, in the state of New York, and Charles H. Benedict, who resides in the city of New York; but all the respondents residing out of this state have come in and submitted their claims to the judgment of this court.

As the facts bearing upon portions of the controversy are somewhat complicated, some of them dating back several years, a chronological statement of them will aid us in presenting the questions involved.

The main portion of the property in dispute consists of an establishment for the manufacture of hats, situated in Danbury in this state. On the 21st of October, 1856, Hiram L. Sturdevant was the owner of this property. On that day he executed and delivered to his brother, Elijah Sturdevant, a quitclaim deed containing the following descriptive clause: "All right, title, interest, claim and demand whatever, which I, the said releasor, have or ought to have in or to the one-half of a certain tract of land situate in said Danbury, containing two acres, more or less, with a hat factory and other buildings standing thereon, and all the mill privileges connected therewith; bounded north on land of the heirs of Caleb Benedict, deceased; east and south on land of the heirs of Talman Wildman, deceased; and west on my own land. Also all the machinery situated in said factory which was possessed and owned by me before the 12th day of August, 1855."

On the same day Hiram L. Sturdevant also executed and delivered to his brother Elijah a lease, the material clauses of which are as follows: "I, Hiram L. Sturdevant, of Danbury, etc., for the consideration of \$1, received of Elijah Sturdevant, etc., have demised, leased and to farm let, and do by these presents demise, lease and to farm let, all the following described property, to wit: all the right, title and interest that I have in and to certain property situate in said Danbury, and particularly described in a deed from me to said Elijah, this day executed, for one-half of said property, it being the remaining one-half of a certain tract of land, situate in said Danbury, containing about two acres, with a hat manufactory and other buildings thereon standing, with all the water and mill privileges connected therewith; also, all the machinery situate and now being in said manufactory. Also a certain dwelling-house, situate near said factory, now occupied as a boarding-house, bounded, etc. To have and to hold until the said Elijah, his heirs and assigns, for the full term of fifteen years from this date, and till the same shall be complete and ended; the said Elijah paying to me, or to my heirs and assigns, executors or administrators, the yearly rent of \$700 during the continuance of said lease; and in default of said payment for any year during said term, said lease to be void, and said property is at once to revert in me, or my heirs or assigns, without notice to the said Elijah, in the same manner as if this lease had not been given."

It is proper here to state the circumstances under which these papers were executed. Hiram L. and Elijah Sturdevant were brothers. The former, prior to 1855, and down to the execution of the deed above named, was the sole owner of the property described in the deed, and of the real estate and most of the machinery referred to in the lease. In 1855 his brother Elijah came from Brookfield to Danbury, and on the 12th of August of that year they formed a copartnership for the purpose of manufacturing hats at the factory in question. The arrangement between them was that they were to be equal partners, and that Elijah should purchase of Hiram L. one-half the factory and machinery, at the price of \$6,000. They immediately went into business with this understanding, but the deed was not made till the 21st of October, 1856. Whether the consideration was all paid prior to that time does not appear, but that is not important. This deed was the formal consummation of the bargain and sale. At the time the deed, as well as the lease, was executed, Hiram L., the grantor, was *in extremis*, and died a few hours thereafter.

Upon the death of his brother, Elijah Sturdevant was in possession of the whole property described in the deed and lease, and continued in possession until December 9, 1864, when he conveyed the unexpired term of the lease to Sturdevant and Benedict, the present bankrupts, and surrendered possession to them. On the 14th of September, 1865, Elijah Sturdevant conveyed, by quitclaim deed, all his interest in the real estate and machinery to Sturdevant and Benedict. The latter continued in possession till the time, or about the time, when the proceedings in bankruptcy were commenced.

On the 1st day of June, 1868, Sturdevant and Benedict mortgaged the factory premises and machinery to James Benedict and Ezra G. Benedict of Albany, as security for a loan of \$20,000. On the 2d of June, 1868, they also attempted to mortgage the same property to Charles H. Benedict, of New York, as security for moneys advanced or to be advanced, but to this deed

there was but one witness, and it is therefore invalid under the statute of this state, and may be laid out of the case.

As already stated, Hiram L. Sturdevant, the original owner of the hat manufactory, died on the 21st of October, 1856, just after having executed the deed and lease to his brother Elijah, already referred to. By his will he left the bulk of his estate, including that portion of the factory and machinery which was not embraced in his deed to Elijah, to his daughter Sarah L. Taylor during her life, and at her death to her children. The will was proved October 24, 1856. The executors named in the will having declined to act, the court of probate appointed Elijah Sturdevant and James S. Taylor administrators with the will annexed. What steps were taken by the administrators in the settlement of the estate does not appear, and need not be determined in the present case.

The first question in order is that which relates to the true construction of the deed and lease of Hiram L. Sturdevant to Elijah Sturdevant. Literally read, these instruments are inconsistent each with the other. In the deed, after the description of the real estate, these words follow: "Also all the machinery, situated in said factory, which was possessed and owned by me before the 12th day of August, 1855."

§ 46. *Where two instruments relating to the same matter are executed at the same time by the same persons they are to be construed together as the same instrument.*

In the lease following the description of the real estate are the words, "also all the machinery situate and now being in said manufactory." Of course these words cannot have a literal operation in both instruments. It is conceded that the machinery in the factory before the 12th of August, 1855, was all owned and possessed by Hiram L. Sturdevant, the grantor in the deed. He could, undoubtedly, have conveyed it all in the same instrument in which he conveyed one-half of the real estate, though, in the absence of any explanation, it would have been a singular and unusual transaction. But the words in the lease are even more comprehensive than those in the deed—"Also all the machinery situate and now being in said manufactory." These words literally cover, not only all the machinery in the factory on the 12th of August, 1855, but all that had been added by the partnership subsequently. It is contended by the assignee that the language of the lease must be restricted, and held to convey the use only of so much of the machinery as the lessor at that moment had an interest in. But how are we to determine what interest the lessor then had? That can be done in no other way than by reference to the deed. The assignee insists that the court should look at the deed, give its words a literal interpretation, and thus restrict the similar clause of the lease to the interest of the lessor in the machinery which the partnership added after the 12th of August, 1855. This statement of the point shows that the two instruments should be compared and construed with reference to each other, unless some stubborn rule of law prevents.

The true doctrine on this subject is well stated by Hosmer, C. J., in *Isham v. Morgan*, 9 Conn., 374, 378, where he says, "The established rule is this: Where two instruments are executed at the same time, between the same parties, relative to the same subject-matter, to effectuate one object, they are to be taken in connection as parts of the same agreement." This proposition is amply sustained by the authorities cited in its support in the opinion from which it is taken. To those may be added *King v. King*, 7 Mass., 496; *Clap*

v. Draper, 4 Mass., 266; *Jackson v. McKenny*, 3 Wend., 233. The present case comes within all the conditions of the rule. The instruments were executed at the same time, between the same parties, relate to the same subject-matter, and were to effectuate the same general purposes which both had in view. The deed was clearly intended to convey one-half of the real estate and machinery, as the latter stood on the 12th of August, 1855, in pursuance of the contract of partnership entered into at that date between the grantor and grantee. The object was to consummate, by formal conveyance, that precise contract, which embraced half the real estate, and half of the machinery, and only half. The object of the lease was to confer the right of possession and use of the other half of both the real estate and machinery, including the lessor's portion of the latter, which had been added after the 12th of August, 1855. The reason is obvious. The partnership had been of short duration, and the establishment which was to be the principal instrument of carrying it on, had been recently completed. Hiram L. Sturdevant saw that he was near his end. His death would dissolve the partnership, and if no provision were made, by which the control of the property would pass to his brother and surviving partner for some fixed period of time, the whole establishment might have to be broken up and sold. The lease, therefore, of the other half was made. When the two instruments are compared with each other, and read in the light of the relation of the parties and the circumstances in which they were placed, there can be no doubt that the object in executing the deed and lease was to convey absolutely one-half of the whole property, the exclusive title of which was in the grantor and lessor, to his brother Elijah, and the other half to him for fifteen years, subject to the rent specified.

This construction does complete and exact justice between the parties, and is consonant with the principles of equity as well as the rules of law. But on the construction contended for by the assignee, by which the whole of the machinery in the factory on the 12th of August, 1855 (and this embraced nearly all there was at the time the deed was executed), is to be deemed as passing to Elijah Sturdevant, the latter would obtain half of such machinery without any consideration whatever. He was to pay \$6,000, and receive a conveyance of one-half of the establishment as it stood when the bargain was made and the partnership commenced, not one-half of the real estate and the whole of the machinery. Had there been no other instrument of conveyance but the deed, and the construction of the assignee were the correct one, equity would have relieved the other half of the machinery on the ground of mistake, on the undisputed facts as they now appear. But, in my view, the whole difficulty is dissipated by comparing the deed and the lease in the light of surrounding circumstances. The latter instrument refers in terms to the former, and, although that and the deed are very imperfectly and inartificially drawn (being done in haste for execution by a dying man), I think it is apparent on the face of the documents themselves that one-half of the property was intended to be conveyed absolutely, and the other half leased for the term of fifteen years. The two instruments thus embraced the whole property, except the half of the machinery added after the 12th of August, 1855, which belonged to the grantee and lessee, and upon which neither deed nor lease was designed to, or could, operate. In this view, were there nothing else in the case, of course the assignee would be deemed to have taken all the estate, both under the deed and lease, subject to intermediate incumbrances, which the bankrupts received from Elijah Sturdevant, which was an absolute

title to one-half under the deed, and the right of possession and use of the other half under the lease to the 21st of October, 1871; when the fifteen years will expire. But at this point the respondents, Taylor, his wife and minor children, interpose the claim that the lease has become forfeit for the non-payment of stipulated rent. This is the next question in order.

§ 47. *A stipulation in a lease that it shall be void in case of non-payment of rent is a condition, not a limitation, and gives the lessor the option to avoid it; does not invalidate it proprio vigore.*

The language of the lease upon which this question is raised is as follows: "To have and to hold unto the said Elijah, his heirs and assigns, for the full term of fifteen years from this date, and till the same shall be complete and ended, the said Elijah paying to me or to my heirs or assigns, executors or administrators, the yearly rent of \$700, during the continuance of said lease, and in default of said payment, for any year during said term, said lease is to be void, and said property is at once to revert in me or my heirs or assigns, without notice to the said Elijah, in the same manner as if this lease had not been given." It is contended by the devisees of the original lessor that this clause of the lease amounts to a limitation, by the terms of which the estate was absolutely to cease and determine in the event of a failure to pay the rent stipulated, on or before the 21st day of October in any given year, and that no act on the part of the lessor, or his heirs or assigns, was necessary to entitle him or them to immediate possession. The assignee, on the other hand, insists that it is simply a condition, expressing a contingency, the happening of which should render the estate voidable at the option of the lessor. The latter view I think the correct one. "Words of *limitation* mark the period which is to determine the estate, but words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate. The material distinction between a condition and a limitation consists in this: that a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs." 4 Kent, Comm., 126, 127, and cases there cited. This is the doctrine of the common law, which now prevails in this state, and must govern this case. *Bowman v. Foot*, 29 Conn., 331. The only absolute limitation in this lease is in the term of fifteen years. To this there is a condition annexed, that, by failure to pay the rent any given year, the term should be cut short, and the lease become void. But it is well understood doctrine that such stipulations are not always construed to mean that the lease shall become void *at the option of the lessor*. *Bowman v. Foot*, *supra*; *Clark v. Jones*, 1 Denio; *Jones v. Carter*, 15 Mees. & W., 718.

§ 48. *To avoid a lease for non-payment of rent there must be a demand of the precise sum due at the proper time.*

In this case there was a failure to pay the rent due on the 21st of October, 1868. The devisees, having succeeded to the rights of the lessor, were, therefore, entitled to avoid the lease. The provision for a forfeiture was, in the eye of the law and of common sense, inserted exclusively for the benefit of the lessor and those who might hold the fee under him. Now what steps were necessary on the part of these devisees in order to avoid this lease and secure themselves the right of immediate possession? Storrs, Ch. J., in

Bowman v. Foot, already cited, remarks: "If the tenant's right is thus voidable only, the option to avoid must be exercised under the contract, and according to legal usage." This legal usage is to be derived from the doctrines of the common law. In *Connor v. Bradley*, 1 How., 211, 217, the court say: "It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay." The same doctrine is laid down in *Taylor's Landlord and Tenant*, 3d ed., p. 346, sec. 493, and in *Van Rensselaer v. Jewett*, 2 Comst., 147; *McCormick v. Connell*, 6 Serg. & R., 151, 153. In the present case there was an attempt to make a demand on the part of the devisees by an agent sent to the premises for that purpose, on the afternoon of October 21, 1868. The particulars of that attempt were detailed by the witnesses on the hearing, and although it is difficult, in view of this evidence, to repress the suspicion that there was collusion between the agent of the devisees and *Elijah Sturdevant*, one of the administrators of the original lessor, and *Edgar Sturdevant*, one of the bankrupts, yet I do not determine the point on that ground. The demand did not conform to the settled rules of law. It was not for the precise sum falling due on that day. The agent could not make such a demand, for he testified that he did not know what amount was due. He simply made demand generally for the rent due. This, in point of fact, included not only the amount falling due that day, but also an unpaid balance on a previous year. In no aspect was this requirement of the law complied with. The lease was, therefore, not avoided, and the unexpired term, with all the rights which belong to it, passed to the assignee, and is to be disposed of for the benefit of the bankrupt estate.

It follows, of course, from this view, that the assignee is entitled to the immediate and exclusive possession of this property, both real and personal. The lease also covers a small piece of land, with the boarding-house standing thereon, of which he is entitled to the possession. This land seems no way in controversy here, as I understand it is conceded by all parties in interest that it was originally purchased as the joint property of *Hiram L. Sturdevant* and his brother *Elijah*, and that the fee of the latter's half passed through the bankrupts to the assignee. The other half is embraced in the lease, and consequently the assignee is entitled to the use and possession of the whole during the unexpired term.

§ 49. **Disputing landlord's title.**—A stranger who obtains possession through a tenant, though by purchase of the land, cannot dispute the landlord's title. *Lockwood v. Walker*,* 3 McL., 431.

§ 50. A tenant while in possession under a lease cannot controvert the title of his landlord. Nor can a person holding under a lease to his wife question the title of the grantor of the lease. *Lucas v. Brooks*,* 18 Wall., 436.

§ 51. A tenant cannot dispute the title of his landlord; but where a party squatted upon public lands, which by the then existing law were not to be appropriated for any purpose whatever, and executed a lease thereof, such lease being utterly void and in violation of law, the tenant thereunder was not estopped to deny his landlord's title in an action for rent by the latter. *Dupas v. Wassell*, 1 Dill., 213.

§ 52. Upon the disavowal of the landlord's title, the relation of landlord and tenant ceases, and, as between them, the tenant becomes a trespasser. The statute of limitations begins to run, and the landlord may sue at once to recover possession without waiting for the expiration of the lease. *Merryman v. Bourne*, 9 Wall., 592.

§ 53. A purchase by a tenant of an adverse title, claiming under or attorning to it, or any

other disclaimer of tenure, with knowledge of the landlord, is a forfeiture of his term; and his possession becomes so far adverse that the statute of limitations begins to run in his favor from the time of such forfeiture, and the landlord may sustain an ejectment against him without notice to quit at any time before the period prescribed by the statute has expired, by the mere force of the tenure, without any other evidence than the proof of the tenancy. *Peyton v. Smith*, 5 Pet., 485.

§ 54. A tenant who has purchased an adverse title cannot, until his title is perfected by the lapse of time, assert such title and ask the aid of a court of equity in sustaining it, without surrendering possession. Until the statute has completely run in his favor his possession is the possession of the landlord. *Ibid*.

§ 55. The general rule is that a tenant shall not dispute his landlord's title; but if a tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser, and he is liable to be turned out of possession, though the period of his lease has not expired. *Walden v. Bodley*, 14 Pet., 156.

§ 56. A tenant cannot deny his landlord's title, but if the plaintiffs in ejectment assert title against their contract with defendant they cannot use it against him to create a tenancy, and thus estop him from contesting their title. *Hughes v. Trustees of Clarksville*, 6 Pet., 369.

§ 57. Assignment—Subletting.—Where lessees, after having sublet the premises, assign all their interest in the lease, such assignment carries all their interest in the rents already accrued as well as rents thereafter to accrue; hence, in an action by the subtenant against the lessees, they cannot counter-claim for rent due and in arrears at the time of the assignment of the lease. *United States v. Hickey*,* 17 Wall., 9.

§ 58. Any number of successive parol occupancies from year to year, or from month to month, by the same tenant, make up, when they are past, but one tenancy. And the successor of such tenant, in the absence of evidence of any new or different contract with him, succeeds to the duties and the rights of his predecessor. *Ex parte Hemenway*, 2 Low., 496 (§§ 238-42).

§ 59. On a covenant to pay rent, reserved by a deed granting real estate subject to an annual rent, the personal representatives of the covenantor are liable for the non-payment of the rent, after an assignment, although there may also be a good remedy against the assignee. The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law of England. *Scott v. Lunt*,* 7 Pet., 596.

§ 60. A fee farm rent being an estate of inheritance, the assignee thereof is, upon the principles of the common law, entitled to sue therefor in his own name, although the estate in the premises and the right of re-entry is retained by the assignor. *Ibid*.

§ 61. A lessee cannot abandon the premises on account of the ruinous state of such premises, if he has underlet a part thereof for a year not yet expired. *Slacum v. Brown*,* 5 Cr. C. C., 815.

§ 62. The receipt by the lessor of rent from an under-tenant of part of the premises is no evidence of the lessor's consent to the lessee's abandonment. *Ibid*.

§ 63. An assignee of the lessee is not liable to the lessor upon the covenants in the lease, unless he is assignee of the whole estate of the original lessee. *May v. Sheehy*,* 4 Cr. C. C., 185.

§ 64. Where a lease forbids the tenant to sublet without the consent of the lessor, any considerable delay on the part of the lessor to enforce his rights under the breach of the terms of the lease, will, it seems, condone or waive such breach. *Kansas City Elevator Co. v. Union Pacific R'y Co.*,* 8 McC., 463.

§ 65. The lessee, under a lease providing that the lessee shall "not sublet said elevator and warehouse, nor assign or transfer this agreement without the written consent thereto of the superintendent of the party of the first part," has the right to sublet, as well as to assign, with the consent of the superintendent. *Ibid*.

§ 66. Where a lease by a railroad company provides against subletting without the consent of its superintendent, and the railroad is put into the hands of receivers, by whom the superintendent is removed and another put in his place to perform his duties, the consent of such appointee is sufficient to render valid a subletting under the lease; and where by such consent the demised premises are sublet to the same parties who had already occupied for two or three months, under a parol lease, without the consent of the superintendent, or any one in charge of the road, the company must be held to have waived such unauthorized subletting. *Ibid*.

§ 67. It is competent for the lessor to separate by contract the rent from the reversion, and if the lessor assigns the lease to secure a debt, such assignment is valid against his assignee in bankruptcy. *Meador v. Everett*, 3 Dill., 214.

§ 68. In general, a lessee has the right to underlet, unless there be a covenant in the lease to the contrary. *Underletting by Lessee*,* 7 Op. Att'y Gen'l, 598.

§ 69. In debt, by the lessor against the assignee of the lessee, the plaintiff is not bound to

show an assignment by deed acknowledged or proved and recorded agreeably to the fourth section of the act of 13th December, 1792, "for regulating conveyances." *Cooke v. Myers*, 1 Cr. C. C., 6.

§ 70. **Attornment.**—It is a well established principle of law, that a tenant cannot dispute the title of his landlord; and where the marshal, having a writ of *habere facias possessionem* for the west half of a lot in the city of Washington, took possession of the east half of the lot, and the tenant of the persons who claimed to be the owners of the lot attorned to the plaintiffs in the writ, such attornment was without authority and void. *Woodward v. Brown*,* 13 Pet., 1.

§ 71. **Threatening a tenant with suit under a paramount title** is equivalent to eviction, and such tenant may submit and attorn to the holder thereof to avoid litigation; but in such case, he is required to show the existence and superiority of such title. *Merryman v. Bourne*, 9 Wall., 592.

§ 72. **Right of re-entry.**—Where a lease of warehouse premises provided that "said elevator will receive and deliver grain for reasonable and compensatory commissions," held, that pooling arrangements entered into by the lessee were not sufficient to justify a re-entry by the lessor. *Kansas City Elevator Co. v. Union Pacific R'y Co.*,* 3 McC., 463.

§ 73. As a remedy for condition broken, courts consider the right of a re-entry a harsh one, and will restrain it within narrow limits, construing the lease for that purpose as strongly in favor of the lessee as the ends of justice will permit. *Ibid.*

§ 74. Where a lease reserves to the lessor the right of re-entry upon failure of the lessee to pay the rents and taxes, no re-entry can be had until a demand has been made for the payment of rents and taxes due. *Ibid.*

§ 75. To give right of re-entry for non-payment of rent, there must, at common law, be a demand of the precise sum due at a convenient time before sunset on the day it was due, at the most notorious place upon the premises, though no one be there to pay it. *Prout v. Roby*, 15 Wall., 471; *Connor v. Bradley*, 1 How., 211.

§ 76. **Use and occupation — Holding over.**—Where there was a parol lease for one year at \$600 per annum, and an occupation for two years, *assumpsit* for \$1,000, held, that plaintiff might recover, although the jury might be satisfied from the evidence that the occupation was not worth so much. *Dermott v. Tucker*,* 3 Cr. C. C., 92.

§ 77. The landlord sold premises after executing a lease of the same under seal. The tenant did not attorn nor in any manner acknowledge himself to be tenant to the vendee, but continued to use and occupy the premises for five years after the sale. The vendee not having taken possession or demanded the rent, held, that the lessor could not recover from the tenant, in an action for use and occupation, the rent for the time he thus continued to use and occupy the premises, as the covenant had terminated with the sale, and the contract being under seal the action must be considered one of covenant. *Blake v. Grammer*,* 4 Cr. C. C., 13.

§ 78. A parol agreement for one year at a rent of \$600 entitles the lessor to recover damages at that rate for the actual time of occupation, upon the count of *indebitatus assumpsit*. *Dermott v. Tucker*,* 3 Cr. C. C., 92.

§ 79. In an action for use and occupation, if the rent be payable quarterly, the plaintiff may recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was. The same principle applies when the rent is payable yearly; but in neither case can the plaintiff recover rent which accrued after his assignment of the lease. *Bank of Columbia v. Galloway*,* 3 Cr. C. C., 353.

§ 80. Where, after the expiration of a lease, the tenant continued to occupy by permission of the lessors, tenants in common, unless there was an express understanding that such occupation should be without compensation, recovery may be had by the lessors for use and occupation, or by one of them, the other having died. *Cobb v. Kidd*,* 19 Blatch., 560.

§ 81. Where rent is fixed by a written lease and the tenant holds over without special contract, he is liable, during the time he continues to occupy, at the rate of rent stipulated in the lease. *Baker v. Root*,* 4 McL., 573.

§ 82. *Assumpsit* for use and occupation will not lie unless there be the relation of landlord and tenant, a holding by the defendant under a knowledge of the plaintiff's title or claim, and under circumstances which amount to an acknowledgment of or acquiescence in such title or claim, and an agreement or permission on the part of the plaintiff. The action will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser. *Lloyd v. Hough*, 1 How., 153.

§ 83. An action for use and occupation cannot be maintained unless the relation of landlord and tenant exists by express contract or by implication; and such relation does not exist where one enters upon land by virtue of an agreement or understanding that he is to be a purchaser, and such purchase be actually concluded. *Carpenter v. United States*, 17 Wall., 489.

§ 84. An action on the case will lie for use and occupation of land in Virginia, although the

statute of 11 Geo. 2 is not in force in that state; but all the joint tenants or tenants in common, interested with the plaintiffs, must be joined as plaintiffs, and if they are not the defendant may take advantage of the omission without pleading it in abatement. *Newton v. Reardon*, 2 Cr. C. C., 49.

§ 85. It seems that in an action for use and occupation the plaintiff can recover only for the time of the actual occupation, although there be a parol lease for a whole year at a certain rent, and the tenant voluntarily quits the premises during the year. The parol demise is only evidence, in such an action, of the rate at which the defendant is to be charged for the time of actual occupation. *Carroll v. Finnagan*, 1 Cr. C. C., 234.

§ 86. *Assumpsit* for rent on a parol demise will not lie at common law. The statute, 11 Geo. 2, chapter 19, remedying this inconvenience, is not in force in Virginia. *Wise v. Decker*, 1 Cr. C. C., 171.

§ 87. In Virginia an action for use and occupation will lie, although there be a parol demise for a time, and rent certain if it be waived, and a promise be made to pay for the time occupied. *Wise v. Decker*, 1 Cr. C. C., 190.

§ 88. Where defendant had been evicted, but subsequently resumed occupation, *held*, in an action for such subsequent use and occupation, that the eviction was no defense. *McGunnigle v. Blake*, 3 Cr. C. C., 64.

§ 89. Distress for rent.—As, under the English law, proceedings in bankruptcy did not destroy the remedy of the landlord by distraint, so under the bankrupt law of 1841 the landlord retained his right of distress for rent in those states where the right existed before the passage of the bankrupt law. *In re Joslyn*,* 3 N. B. R., 478.

§ 90. The landlord has no claim upon, nor right to distrain for arrears of rent, goods of a third person left upon the demised premises for the tenant to sell as auctioneer, even though the tenant has made advances upon such goods; and upon the bankruptcy of the tenant, his assignee having turned over to the landlord the proceeds of the sale of the personal property of the bankrupt, the landlord has no claim upon the proceeds, in the assignee's hands, of the property which the bankrupt held for sale as auctioneer. *In re Bailey*,* 2 Fed. R., 850.

§ 91. The slave of a stranger hired to, and in the employ of, a lodger in a boarding-house, as personal servant, is not liable to be distrained for rent due from the boarding-house keeper as tenant. *Beall v. Beck*,* 3 Cr. C. C., 666.

§ 92. Property distrained for rent may be transferred by the tenant to his creditor, subject to the lien for rent, and after the distress is relieved the officer still retaining the goods holds them as trustee of the assignee, and cannot levy an attachment upon them in behalf of other creditors of the tenant. *Cooke v. Neale*,* 1 Cr. C. C., 493.

§ 93. A lease for twenty years, not acknowledged or recorded, is not a lease at will; and the landlord may distrain for rent, although the original lessee should not have been in possession for several years next before the distress, or should have died. *Semmes v. McKnight*, 5 Cr. C. C., 539.

§ 94. The tenancy does not cease by the tenant's setting up an adverse claim more than six months before the distress. *Ibid*.

§ 95. Where a note is made by the landlord, for the accommodation of the tenant, and indorsed by a third person, and goods of the tenant are conveyed in trust to secure the landlord and his indorser against liability on the note, such goods being left upon the premises by the consent of the landlord, are not liable to his distress for rent accruing after the deed of trust, while the third person remains liable on the note. *Law v. Stewart*, 3 Cr. C. C., 411.

§ 96. A bailiff cannot lawfully force himself into a house by the outer door (although partially opened by one within) to make a distress for rent. *United States v. Scott*, 2 Cr. C. C., 552.

§ 97. A constable in levying a distress for rent in the county of Alexandria is not acting in the discharge of his official duty, within the principle of the law which makes the killing murder, when it would not have been murder if he had not been an officer; and the constable can justify by those acts only which would have justified the landlord if he had personally distrained. So held on trial of a prisoner charged with murder by killing a constable who came to the house of the prisoner to levy a distress for rent. *United States v. Carr*, 2 Cr. C. C., 438.

§ 98. A distress for rent is not lawful unless there is an express contract for a certain rent. *Ibid*.

§ 99. A distress for rent, laid on the last day of the term, at noon, is too soon, although the goods were not appraised until the next day. *Johnson v. Owens*, 2 Cr. C. C., 160.

§ 100. Chairs left with a painter to be repaired are not liable to distress for his rent. *Mauro v. Botelor*, 2 Cr. C. C., 372.

§ 101. Under the act of Maryland of 1779, chapter 25, costs do not accrue upon levying a distress for rent, unless the goods are sold. Hence in replevin of goods thus distrained, verdict for the defendant, the costs of levying the distress cannot be taxed. *Wright v. Waters*, 2 Cr. C. C., 342.

§ 102. An agreement to sell and transfer goods seized and held as a distress for rent due from the vendor will transfer the general property so as to enable the vendee to maintain trover after the goods have been replevied by the vendor. *Cooke v. Woodrow*, 1 Cr. C. C., 487.

§ 103. Upon the issue of "no rent arrear," the plaintiff in replevin for goods distrained for rent will not be permitted to show that the defendant "had nothing in the tenements," nor can the defendant give evidence of the value of the use and occupation. An assignment by the lessor, during the term, without attornment, does not prevent the lessor from distraining. *White v. Cross*, 2 Cr. C. C., 17.

§ 104. In replevin, avowry for rent arrear, plea no rent arrear, the court refused to instruct the jury that the defendant must prove that the distress was laid by himself, or by some one by him duly authorized; and that the defendant had no right to distrain after the death of the lessee. *McLaughlin v. Riggs*, 1 Cr. C. C., 410.

§ 105. In replevin of goods distrained for rent, avowry of rent arrear, with prayer for judgment for double rent, the avowry was considered *prima facie* evidence of the amount of rent distrained for, and judgment given for double rent under the statute of Virginia (Old Rev. Code, 165, § 15). *Alexander v. Harris*, 1 Cr. C. C., 243.

§ 106. Under the statute of Virginia, goods not upon the premises may be attached to secure rent not due. *Brocket v. Johns*, 1 Cr. C. C., 100.

§ 107. If the landlord evict the tenant from a part of the premises, he cannot distrain for the rent. If he is entitled to an apportionment of the rent, he may maintain an action for use and occupation; but if not entitled to an apportionment of the rent, he has no remedy. *Baker v. Jeffers*, 4 Cr. C. C., 707.

§ 108. A negotiable note was given by a tenant to his landlord, which, when paid, was to be received "on account of rent." The note was discounted for the landlord and the proceeds received by him upon his indorsement of the note to a bank. The note was protested by the bank and afterwards taken up by the landlord. Upon a distress for the rent, the tenants offered to pay the balance of rent, after deducting the amount of the note. *Held*, that the taking of the note, and the offer to pay the balance of the rent, were no bar to the landlord's remedy by distress; because the note, by the terms of the receipt, until paid, was no payment of the rent. *Griffin v. Woodward*, 4 Cr. C. C., 709.

§ 109. A distress is not a judicial process, but a private remedy of the party entitled to the rent, service, or other duty for which the tenant is liable; and when the party who has made the distress comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the court. *Ross' Executors v. Holtzman*, 3 Cr. C. C., 391.

§ 110. Trover against the owner will not lie by a bailiff who distrains goods for rent, and leaves them on the premises of the owner, who takes them away. *King v. Fearson*, 3 Cr. C. C., 355.

§ 111. Goods fraudulently removed by the tenant, although not secretly or clandestinely, may be followed and distrained by the landlord. *Jenkins v. Calvert*, 3 Cr. C. C., 216.

§ 112. The tenant's removal of his goods before the expiration of the term, without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the landlord. *Ibid*.

§ 113. Notice to quit.—A distress warrant may be a waiver of notice to quit, but as waiver is always in part a question of intent; if the warrant is issued without authority, or is disavowed by the landlord, it does not operate as such waiver. *Lucus v. Brooks*,* 18 Wall., 496.

§ 114. A tenant who disclaims his landlord's title is not entitled to notice to quit and deliver up possession. *Woodward v. Brown*,* 13 Pet., 1.

§ 115. Note taken for rent.—Where a landlord takes the note of a third person for the amount of rent due from his tenant, this of itself is not a discharge of the rent unless it appear that the note is paid; but, if it appears that the note was held by the landlord, and credit given on it to such third party, either by taking an additional security on it, or from any other cause, or that by the landlord's negligence the tenant has lost the sum intended to be secured by the note, these facts are competent to support the plea of no rent arrear. *Josse v. Shultz*,* 1 Cr. C. C., 135.

§ 116. Where a landlord takes the note of his tenant for the amount of his rent and gives a receipt in full, if such note is not paid at maturity, the landlord is entitled to the same remedies for the security or collection of the debt, by distress or otherwise, as if the note had never been given. *In re Bowne*,* 12 N. B. R., 529.

§ 117. A receipt for last year's rent is evidence that the rent for the preceding years has been paid. *Jenkins v. Calvert*, 3 Cr. C. C., 216.

§ 118. Where lessor's land is sold at sheriff's sale, the sheriff's deed conveys the reversion, and the rent follows it as an incident. S. leased land to G. and G. gave his note for the rent,

secured by mortgage on the crop. E. had the land sold on execution, and bought it at sheriff's sale, whereupon S. transferred to him the note. The tenant G. sold the crops to B., who had notice of the lease and mortgage. In accordance with the above, it was held that the lease passed by assignment to the grantee, and all its provisions in favor of the lessor inured to the benefit of the assignee; that the crops sold went impressed with the lien of E., and that B. took the proceeds of the crops in trust for the benefit of E. *Butt v. Ellett*, 19 Wall., 544.

§ 119. Lease not acknowledged and recorded.—Under a statute of Virginia to the effect that "no estate for more than seven years shall pass or take effect unless the deed be acknowledged and recorded," *held*, that a lease for ninety-nine years, not acknowledged and recorded, is not good for seven years, but is evidence of the rate of renting in an action for use and occupation. *Brohawn v. Van Ness*, 1 Cr. C. C., 386.

§ 120. Under the Maryland act of 1766, chapter 14, section 2, a lease for ten years, though unrecorded, is good for seven years. *Van Ness v. Hyatt*, 5 Cr. C. C., 127.

§ 121. Destruction by fire.—Where a lease contains no covenant to the contrary, destruction of the subject-matter of a demise will terminate the lease. Accordingly, where the demise was of "all that messuage, tenement and premises known as house No. 468 Eleventh street," etc., the building having burned down and the premises being abandoned by the tenant, the lessor built another and more expensive house, upon the same spot, before the expiration of the time mentioned in the lease, and occupied it himself, upon suit brought by the lessee to recover the difference between the rental value of the property before the fire and after the new building was erected, it was held that he could not recover. *Schmidt v. Pettit*,* 1 MacArth., 179.

§ 122. Where a lease provided that in case of the destruction of the house by fire the rent was to cease until the house should be rebuilt by the landlord, *held*, that if the landlord did not choose to rebuild during the term, the tenant was discharged from the payment of rent, and that since mutuality of obligation is necessary in every contract, the tenant could not be held for rent after the house was built unless he elected to enter into possession of the restored premises; that the landlord, not being bound to rebuild, as this discharged the tenant from his obligation to pay rent, the lease was put an end to by the fire. *Ibid*.

§ 123. Creating the relation of landlord and tenant, and not that of master and servant.—C., the owner of a shingle-mill, entered into a contract with D. by which D. was to run the mill for the milling season of 1877 and pay all expenses. C. was to put the mill in condition and furnish the logs necessary to run the mill, and D. was to receive a certain price for all shingles manufactured. *Held*, that the contract created the relation of landlord and tenant between C. and D., and not that of master and servant, and that C. was not responsible for D.'s conduct in running the mill negligently. *Mason v. Clifford*, 4 Fed. R., 177.

§ 124. Lease not signed but acted on.—A lease was reduced to writing and acted upon by the parties but was not signed. *Held*, that it must be regarded as binding as if signed. *Farmers' Loan & Trust Co. v. St. Joseph & Denver City R'y Co.*, 1 McC., 248.

§ 125. Letting of a race-field.—Where the owner of a race-field lets the same for public races, knowing that it will be used for the accommodation of licentious and disorderly persons for the purposes of unlawful gaming and gross immorality and debauchery, and it is so used, he cannot recover the rent in an action of covenant. *Holmead v. Maddox*, 2 Cr. C. C., 161.

§ 126. Dependency, how determined—Assignment of lease.—Where the covenants in an agreement are dependent or concurrent, the plaintiff must allege and prove performance of or an offer to perform the covenants on his part. And, in order to determine whether the covenants are dependent, the intention of the parties is to be discovered rather from the order of time in which the acts are to be done than from the structure of the instrument or the arrangement of the covenants. Thus, where by a contract to assign a lease the plaintiff was required, within a certain time, to sow the land in wheat and rye, in which condition it was to be delivered to the defendant, the covenants were held to be dependent, and the plaintiff was held bound to prove a performance of or an offer to perform the covenants to sow and convey the land. *Goodwin v. Lynn*, 4 Wash., 714. See § 894.

§ 127. Construction of lease of water power.—A lease giving a right to draw from a canal the amount of water that will flow through an aperture of a given size and position is a grant of a certain quantity of water, in bulk or weight, which is to be ascertained by the rules of hydraulics, from the state of things existing at the time, and the circumstances in which the lease was made. And if the lessee has made large expenditures in constructing his forebay, and has constructed in such a manner that not more than one-half of the water will flow through the aperture which would otherwise flow through it, he is entitled to have the aperture enlarged. *Canal Co. v. Hill*, 15 Wall., 94.

§ 128. Repairs.—Where the government executes a lease with a full knowledge of the condition of the building leased, and with no agreement that the lessor shall make repairs, it can-

not make repairs for its own convenience and withhold the cost of the same from the rent. On the contrary, it is liable in damages if such alleged repairs have been injurious to the building. *Warren v. United States*,* 4 Ct. Cl., 526.

§ 129. **Grantee of reversion—Lease under seal.**—In the absence of legislation upon the subject the grantee of a reversion cannot enter, or bring ejectment for breach of the covenants of a lease, unless under seal, as at common law he had no such right; and the statute of 32 Henry VIII. confined the right to leases under seal. *Sheets v. Selden*, 2 Wall., 177.

§ 130. **Rent—Demand—Computation of time.**—Where a lease provided, if any of the rent should remain unpaid for one month from the time it should become due, all rights under the lease should be forfeited, *held*, that the rent becoming due on the 1st of May, the one month from that time within which the payment was required to be made to prevent forfeiture expired on the 1st day of June following: that in the computation of the time, the day upon which the rent became due was to be excluded. *Ibid*.

§ 131. **Verbal authority from the lessor is sufficient to duly qualify a person to act as lessor's agent in demanding payment of rent.** *Ibid*.

§ 132. **In the absence of legislative provision the term "month," as used in contracts and deeds, means a calendar and not a lunar month, unless the parties have otherwise expressly provided.** *Ibid*.

§ 133. **Vendor and vendee.**—The relation of landlord and tenant does not exist between vendor and vendee, so as to prevent the vendee from fortifying his title by buying in any other as against the vendor. This is especially the case where a conveyance has been executed. *Watkins v. Holman*, 16 Pet., 25.

§ 134. **An attachment for rent not due, levied upon goods already in the hands of an officer under a distress, held valid.** *Herbert v. Ward*,* 1 Cr. C. C., 30.

§ 135. **Although in Mississippi a landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent, when the attachment is sued out his rights are the same in effect as those of the landlord at common law.** *Austin v. O'Reilly*, 2 Woods, 670.

§ 136. **The landlord cannot maintain trespass for an injury to his tenant, nor can he have a writ of forcible entry and detainer against one who expels his tenant, his possession being merely constructive.** *Pitman v. Davis*, Hemp., 29.

§ 137. **A bona fide purchaser at a tax sale without collusion with the tenant may enter under his purchase, and convey to a third person, who will not thereby become tenant of the original landlord; but if there be collusion between the tenant and the purchaser to suffer the taxes, which it was the duty of the tenant to pay, to remain unpaid, and thereby to cause a sale by the collector of taxes, so as to enable the purchaser to buy in the property for the benefit of the tenant, the title of the property is not changed by such tax sale, and the tenant remains tenant to the original landlord.** *Semmes v. McKnight*, 5 Cr. C. C., 539.

§ 138. **Payment of taxes.**—Under a reservation of \$20 rent, "clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent, although there be a clause of re-entry for the non-payment of rent. *Ibid*.

§ 139. **Lease to four jointly.**—A lease was executed to four persons, A., B., C. and D., they being jointly bound to pay the rent. The lease stipulated that the first floor of the building leased should be used for the purpose of tailoring, and the remainder of the building for a hotel, and that upon failure to pay rent the landlord could re-enter and dispossess the tenants from the whole building. A sub-agreement was entered into by the four, to the effect that A., B. and C. should have the use of the first floor, and D. the rest of the building, each of them to pay a certain share of the rent. A. subsequently acquired the interest of the three. D. having failed to pay his share of the rent, A. paid a portion of it. D. becoming bankrupt, his trustee paid the next instalment of rent due from D. according to the sub-agreement, but refused to pay any part of the instalment, a part of which had been paid by A. *Held*, that A. was entitled to as full use of the hotel part of the premises as the trustee, until the trustee should pay in full what, by the sub-agreement, D. was to pay in order to enjoy, as against the other three, the exclusive use of such hotel part. *In re Hotchkiss*,* 7 Ben., 235.

§ 140. **Delay of tenant in performing conditions.**—The lessee of mineral lands taken "to farm," the consideration to the lessor being a percentage of the profits to be derived from the minerals taken from the lands, must, although his lease be for ninety-nine years, with privilege of renewal for a like period, elect within a reasonable time, and begin to develop the mineral resources of the land or abandon the lease. The circumstances of the case must determine what is such reasonable time. Where the lands were situated in the mountains, with no means of transportation, and nothing had been done by the lessee for twenty-five years, but at that time a railroad was under process of construction and nearly completed to such lands, *held*, that he was entitled to two years more in which to elect. *Price v. Nicholas*,* 4 Hughes, 616.

§ 141. **Where a lease contained a clause that the lessee was to commence operations under**

the lease by a certain date, *held*, that it was not a condition the non-performance of which determined the plaintiff's rights, or worked a forfeiture of his interest under the lease; that the time fixed in the lease within which the lessee was to commence operations was of the essence of the contract, so far as to enable the lessor, after its expiration, to maintain an action against the plaintiff for the non-performance of his stipulation, but not so as to divest his interest under the lease. *Barker v. Dale*,* 3 Pittsb. R., 190.

§ 142. Where a lease of lands for the purpose of mining contained a clause that the lessee was to begin operations by a certain date, which the lessor did not do, and the lessor subsequently let the premises to another, the court instructed the jury that, if they were satisfied that the lessee intended to surrender his lease, and to abandon altogether the commencement or prosecution of mining operations, and that his acts touching such abandonment were perpetrated with such intention, he was not entitled to recover possession of the premises or damages. *Ibid*.

§ 143. Reserving use of land for purpose of tillage.—Where a lease granted to the tenant for a fixed term the premises therein stated, subject to the lessor's "use of the same for the purpose of tillage," *held*, that this was exclusive of any right of the lessor to mine or excavate within the defined limits of the premises. *Ibid*.

§ 144. A conveyance by plaintiff's lessor during the pendency of an ejectment suit does not extinguish his lease, but only operates upon the reversionary interest of the lessor. *Robinson v. Campbell*, 8 Wheat., 212.

§ 145. To constitute a lease and create the relation of landlord and tenant, neither a reservation of rent, nor any particular form of words, is necessary. If the effect of the contract is to divest the owner of, and put the other into, possession of the premises for a determinate time, such an agreement will, in construction of law, amount to a lease. *Mason v. Clifford*, 4 Fed. R., 177.

§ 146. A tenant who buys a tax title to the land he occupies as tenant holds in trust for his landlord. *Williams v. Morris*, 5 Otto, 444.

§ 147. Breach—Penalty.—A lease of premises at a yearly rental of \$3,000, payable in monthly instalments, provided that if the tenant, without the consent of the landlord, should underlet, or attempt the removal of any goods on the premises, "then, in either event, at the sole option of the landlord, the term should cease, and moreover, in either of said cases, one whole year's rent, to wit, the rent of \$3,000 over and above all such rents, . . . as shall have then already accrued, shall be and by these presents is reserved to be paid, . . . and shall immediately thereupon accrue and become due and owing, . . . and shall and may be levied by distress and sale of all such goods and chattels as may be found upon the premises." A removal was had and levy made more than a year before the expiration of the lease. *Held*, that the reservation of the \$3,000 in advance was not a penalty, but was intended for the better security of the rent, and became a substitute for the rent reserved, payable monthly. *Dermott v. Wallach*,* 1 Wall., 61.

§ 148. Lease under seal varied by subsequent settlement.—The defendant, in company with another, entered upon premises under a lease for five years, under seal. After occupying for about three years, a final settlement took place respecting the partnership transaction. By this agreement the defendant was to remain in possession of the premises for two years, the rent for the first year to be paid by improvements on the farm, and the amount of the second year's rent was to be fixed by H. Shortly thereafter the defendant repudiated the settlement and the new lease, and claimed to hold under the old lease. *Held*, first, that the first lease, although under seal, was abrogated by the settlement and the agreements there entered into; second, that, although the agreement as to the rent for the further term was to be fixed by H., which had not been done, the defendant was liable for use and occupation during the two years which he continued to hold after the settlement. *Scott v. Hawsman*,* 2 McL., 180.

§ 149. Sale of stalls under charter authorizing a market.—By act of congress, May 20, 1870, the appellant was authorized to erect a market with stalls and sell the same to the highest bidder "for one or more years," subject to the payment of an annual rent, etc. And it was provided that the successful bidder should "be considered as having the good will and the right to retain the possession thereof (viz., the stall), so long as he chose to occupy the same for his own business and pay the rent therefor." The stalls were sold at auction for a term of two years from July 1, 1872. Appellees bought the several stalls which they occupied, and claimed that they were entitled to hold the stalls as long as they chose to occupy them for their own business and pay the rent, although the term of two years had expired. *Held*, that the charter did not authorize appellant to create a tenancy at will, but required it to sell the stalls for a term, with the privilege of fixing the length of the term; and that appellees had no right to continue in possession after the term of two years had expired. (*BRADLEY and HARLAN, JJ., dissented.*) *Market Co. v. Hoffman*, 11 Otto, 112.

§ 150. An agreement for a lease will be construed as a present demise if no further formal lease is contemplated by the parties, and possession is taken under it. *Jenkins v. Eldredge*, 3 Story, 329.

§ 151. Lease—Breach by lessee—Cancellation.—A. and his wife entered into a contract with B., by which B. was put into possession of a stock farm belonging to the wife of A., to manage its business and operations, and, retaining one-third of the profits, to account to A. and his wife for the other two-thirds. The stock and farming utensils then on the farm were to be valued, and accounted for at the end of the lease. The expenses were to be paid out of the general stock fund of the concern, and the concern was to allow interest on advances made by either of the parties. In case of the death of B. during the term, the other parties were to have peaceable possession of the premises. The length of the lease was eleven years, and no rent was to be paid. About a year after going into possession B. began to sell the stock, and, A. having died about that time, continued the sales until all was disposed of. He subsequently leased the farm to a third person, but paid no rent to the widow of A. It was held that B. had disregarded the contract and rendered himself unable to carry it into effect; that the widow was under no obligation to continue it, and that she was entitled to have it canceled and to have possession of the premises, notwithstanding B.'s offer to give security for the payment of any rent that had accrued under his lease to the third person, or that might accrue. *Tibbatts v. Tibbatts*, 6 McL., 80.

§ 152. Payment of rent at the place named becoming impossible.—Where the payment of rent at the place named for that purpose becomes impossible, it is incumbent upon a party claiming a forfeiture for the failure to pay rent to fix another place, and to give notice to the lessee of such change. *People of Vermont v. Society for Propagating the Gospel*, 1 Paine, 658.

§ 153. Breach by lessor—Probable profits.—The assignee of a lease for five years, reserving a rent of \$250, entered into possession during the second year of the lease. At the end of this year the lessors refused to allow the assignee to enjoy the privileges conferred by the lease unless he would pay a rent of \$500 instead of \$250, which the assignee refused to do. Upon the bankruptcy of the lessors, and petition by the assignee, the register reported that he was entitled to prove a claim against the estate for \$350, for each of the three years during which he was excluded. *Held*, that the probable profits of the assignee, had he been allowed possession, could not be allowed; and that as there was no evidence that he could have rented the premises for \$350 per year more than the rent stipulated in the lease, he had no claim whatever upon the estate. *In re Leland*,* 8 Ben., 254.

§ 154. Payment of rent to military authorities.—Where the lessor leaves the state, and, the military authorities of the United States having seized his property as abandoned, his lessee according to the order of said authorities pays rent to them, he cannot recover on the lease rent for the period during which the lessee thus held under, and paid rent to, the military authorities. *Harrison v. Myer*,* 2 Otto, 111.

§ 155. Action for rent.—To an action of covenant for rent the defendant cannot plead that his lessor has not paid the ground rent according to his covenant. *Gill v. Patton*,* 1 Cr. C. C., 143.

§ 156. An averment, in avowry, of a lease for three years, is not supported by proof of a lease for one year certain, and subsequent possession for two years; but the plea of "nothing in arrear" admits the demise, and dispenses with proof on the part of the avowant. *Alexander v. Harris*,* 4 Cr., 299.

§ 157. If the jury find the amount of rent arrear in damages, without stating it to be the amount of the rent, the court will permit the verdict to be so amended by the clerk after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried. Upon such a verdict the court will award a *retorno habendo*, and will not arrest the judgment because the jury have not found the value of the distress taken. *Arguelles v. Wood*, 2 Cr. C. C., 579.

§ 158. The want of title in fee in the plaintiff is no bar to an action for rent, upon a lease for seven years, with leave to purchase the fee-simple within that term, the defendant not having been evicted. *Crampton v. Van Ness*, 4 Cr. C. C., 850.

§ 159. To enable a landlord to recover double rent for holding over, the lease must be for a specific term; but a renting for \$60 a year, payable monthly, is not for a specific term. *Nixdorff v. Wells*, 4 Cr. C. C., 350.

§ 160. If the landlord draws an order on his tenant, on account of rent, and the tenant accepts but does not pay it when due, and suffers himself to be sued for it by the payee, he is not entitled to set it off in a replevin suit, avowry by the landlord, under the plea of no rent arrear, if the landlord, at the trial of the replevin, produces the order canceled, and offers to surrender it to the tenant, and to pay the costs of the suit brought upon it. *Arguelles v. Wood*, 2 Cr. C. C., 579.

§ 161. Where land is conveyed in fee, reserving a perpetual ground rent, the assignee of

such rent may maintain an action of covenant against the administrator of the original grantee, for rent accruing after the death of that grantee, although the land has descended to his heir, subject to the rent. *Scott v. Lunt's Administrator*, 3 Cr. C. C., 285.

§ 162. **Bankruptcy of lessee.**—Where property in Louisiana has been seized under a "writ of provisional seizure" by the lessor for rent due, upon the subsequent bankruptcy of the lessee, a district court sitting in bankruptcy cannot take the property thus seized and in the hands of the sheriff as a pledge for rent due and hand it over to the bankrupt's assignee, to be disposed of by order of the court, as neither the lessor nor the sheriff are parties to the suit in bankruptcy. *Marshall v. Knox*, 16 Wall., 551.

§ 163. Where lessees in a lease for one year became bankrupts within two months after the execution of the lease, *held*, that no rent accruing after the adjudication in bankruptcy could be allowed or proven against the estate of the bankrupts. *Bailey v. Loeb*, 2 Woods, 578.

§ 164. Where a landlord instituted summary proceedings for dispossession under the statutes of New York, and while these proceedings were pending the tenants were put into bankruptcy, and the proceedings in the state court enjoined by the bankruptcy court, *held*, that the landlord is not to prove his debt for the rent from the date of service of the injunction to the date of the adjudication as a general creditor, but is to be compensated for the use of the premises from the date of such service to the time he regained possession after the adjudication in bankruptcy, by applying to the court and having a proper allowance made and paid by the assignee, in view of all the facts in the case. In the *Matter of Lynch*, 7 Ben., 26.

§ 165. An assignee in bankruptcy is bound to compensate a landlord for the use of premises occupied by him in winding up the estate of the tenant. He does not, however, by accepting the trust, become the assignee of leases belonging to the bankrupt or become bound by any covenants contained therein. To make the assignee liable as a tenant, it must appear that his occupancy was not merely technical, but substantial and beneficial. *In re Ives*,* 18 N. B. R., 28.

§ 166. After the bankruptcy of a tenant, the landlord is entitled to nothing by virtue of the covenants of the lease, unless the assignee elects to take the lease and thereby becomes, in fact, assignee of the lease. And where premises leased to the bankrupt were occupied by the marshal to store property seized by him, *held*, that the compensation to be paid the landlord was not to be computed at the rate of rent stipulated in the lease, but was to be measured by the benefit thus rendered; that is, the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense than for storage proper. *In re Wheeler*,* 18 N. B. R., 385.

§ 167. A lessee made a voluntary assignment in bankruptcy. His assignee, finding all the goods of the bankrupt under a distress for rent in arrear, made an arrangement with the lessors by which the distress was withdrawn, he promising to pay the rent then in arrear, and all rent accruing during his occupancy of the premises, but at the same time disclaiming all interest in the lease. Upon surrendering possession, he paid the rent up to that day and delivered the keys of the premises to the lessors. The lessors then rented the premises to other tenants at a lower rental. The former lessee having been adjudicated bankrupt, the lessors claimed as damages against the estate of the bankrupt the rent accruing under the former lease, after the assignee vacated, less the sums received from the new tenants. *Held*, that there was neither an eviction of the tenant nor a surrender of the lease, but merely an abandonment of the premises by the tenant, and that the claim of the lessors for damages must be allowed. *In re Orne*, 12 Fed. R., 779.

§ 168. Parties were adjudged bankrupts while in the possession of rented premises upon which was machinery of their own. Their assignee took possession of this machinery, which he allowed to remain upon the premises some time before selling it. Upon petition of the landlord to be allowed for use and occupation, *held*, that the estate in bankruptcy of the bankrupts should, to the extent that the estate has been benefited by the use and occupation of the premises, make compensation for such use and occupation. Upon the evidence, \$200 appearing to be such reasonable compensation, it was allowed. In the *Matter of Fowler*, 8 Ben., 421.

§ 169. Where parties occupied a store under a lease providing that in case of failure to pay rent the landlord might re-enter and relet the premises as the agent of said parties, said parties to be liable for the deficiency in case the rent received by the reletting did not equal the amount of rent specified in the original lease, and said parties became bankrupt, and the landlord sought to prove against the estate not only the rent due at the time of the bankruptcy, but a deficiency occasioned by his reletting the premises after proceedings in bankruptcy were instituted in accordance with the terms of the lease, *held*, that the provable debt ought to be reduced to the amount of rent due at the time bankruptcy proceedings were instituted; but that there might be a valid claim for the value of the use and occupation of the premises by the court and the assignee after the bankruptcy. In the *Matter of Croncy*, 8 Ben., 64.

§ 170. B. and S., when adjudged bankrupts, were in possession as tenants of premises leased from R. Machinery of theirs was in the building which could not be removed without injury

to the building. This was allowed to remain there for sixteen days, when the assignee in bankruptcy sold it to F., who at once rented the premises of R. Upon petition of R. for use and occupation of the premises during the time that the machinery was allowed by the assignee to remain in the building, at the rate of rent stipulated in the lease, *held*, that the lease was canceled by the bankruptcy, as by its terms it could not be assigned without the consent of the landlord, but that as the court found the rate reasonable it would be allowed; that although the fact that the machinery remained in the building prevented injury to the building, inasmuch as the estate would have been liable for such injury had it occurred, the estate was benefited and the landlord injured by reason of the machinery remaining in the building, and the landlord was entitled to compensation for use and occupation. In the Matter of B. and S., Bankrupts, 8 Ben., 98.

§ 171. Under a Pennsylvania statute providing that, where property liable to distraint for rent is seized and sold under execution, the rent due for a period not exceeding one year shall be paid first out of the proceeds of the sale, it was *held* that in case of the bankruptcy of the lessee, and demand of rent by lessor of the assignee in bankruptcy, the case was within the equity of the statute, and the landlord was entitled to his rent in preference to other creditors, the same as in case of sale of lessee's property on execution. Longstreth v. Pennock, 20 Wall., 575.

§ 172. A lessor under the code of Louisiana may seize goods of the lessee for rent in arrears and hold the same against the assignee of the bankrupt lessee, where the proceedings in bankruptcy were instituted subsequent to the seizure. Marshall v. Knox, 16 Wall., 551.

§ 173. United States as lessee.—Where property was rented by the United States to be used as a custom-house upon the recommendations of a collector of the customs, he being a joint owner of the premises, and not disclosing his interest in the premises, and during the continuance of the lease the property was conveyed by the joint owners to L., upon the discovery by the secretary of the treasury that the property was unsuitable to the purposes for which it was leased and that the rent was exorbitant, *held*, that the collector having an interest in the property leased upon his recommendation rendered the lease fraudulent and void, and these facts being matters of observation and record precluded L. from recovering damages against the United States for annulling the lease. Larkin v. United States,* 5 Ct. Cl., 526.

§ 174. Where the United States rented certain premises and then sublet them to H., the sublease providing, after stipulating for rent, that the sum of \$250 "is hereby saved and reserved to the said party of the second part, during the term, as a bonus to the said party for leasing said warehouse, to be paid at the expiration of each month," and afterwards assigned the lease to the original lessor, by whom H. was subsequently evicted for non-payment of rent, *held*, that the bonus mentioned in the sublease was a mere reservation out of and deduction from the rent to be paid, and continued only while the lease was in force; that after his eviction H. had no claim for the bonus against either the United States or the original lessor, except that the bonus accrued prior to his eviction might be a set-off against any demand for rent preferred against him by said lessor. Hickey v. United States,* 5 Ct. Cl., 895.

§ 175. Certain land was leased to the state of Ohio at a fixed rent, the state covenanting to pay any damages that might be done to surrounding property by reason of the occupancy of the premises. The United States entered into possession of the premises, under an assignment of the lease from the state of Ohio, and paid the stipulated rent to the original lessor. They afterwards gave notice that they would surrender a portion of the premises, but the lessor refused to accept the surrender. Thereafter the United States occupied only that portion of the premises not proposed to be surrendered. *Held*, that payment of the stipulated rent by the government is sufficient evidence that its entry was under and as assignee of a lease from the owner to a third party, and not by its right of eminent domain; that the government, having entered under and as assignee of a lease for one year, and having continued to hold after the term, it was a tenancy from year to year upon the terms of the lease, and subject to all its covenants; that the government had no power to relinquish a part of the premises, and apportion the rent without the consent of the landlord, and that the surrender not being accepted by the landlord, it was liable for the entire rent so long as it occupied any part of the premises; that under the covenants of the lease it was liable for injuries done by soldiers to the fences and crops of adjoining lands. Kugler v. United States,* 4 Ct. Cl., 407.

§ 176. Although ejectment does not lie against the government, whenever, in an action in the nature of ejectment, the claimant's right of property is established, the government will be deemed to have entered as his tenant under an implied lease, whereof the "just compensation" secured by the constitution to those whose property is taken for public use is the rent. Under such implied lease, the measure of the damages must be limited to the value of the occupancy, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy, and to the fact that the government holds the option of discontinuing the implied tenancy at any time or continuing it indefinitely. The

yearly value of the occupancy being judicially established, it will remain fixed, as though the parties had leased and rented the premises on those terms. On the part of the claimant, a second action to obtain a re-appraisal of rent accruing since his first action was brought cannot be sustained; on the part of the government, it will be the duty of the proper executive department and of congress to procure and make the needful appropriations for paying the implied yearly rent so long as the government retain possession. *Johnson v. United States*,* 4 Ct. Cl., 248.

§ 177. Where the United States as tenants agree to restore the premises in good order, and upon surrendering the possession the lessor refuses to accept the premises, insisting on repairs being made, and the United States make such repairs, they are liable for rent while making such repairs. *Hoover v. United States*,* 3 Ct. Cl., 308.

§ 178. Where the United States by one agent rents premises, but another being ignorant of the lease takes possession and occupies the premises by order of the quartermaster-general, who also orders that rent be paid at \$160 per month, the United States must be held to have gone into possession under the lease executed by the former agent, and not under an implied contract arising from their occupancy through the latter agent. *Ibid.*

§ 179. A deed of realty executed in time of war within the United States lines to citizens of the United States by the attorney of the grantor, while the grantor is within the Confederate lines and an alien enemy, is void as a contract between enemies, and a quartermaster of the United States cannot bind the government upon a lease of such realty, the title to which was thus unlawfully acquired against the public policy of the United States, and in violation of the law of nations, the circumstances being known to the quartermaster at the time of executing the lease. In a case of this kind, although the property was never confiscated, but on the contrary was held and used by the United States, to all appearances under the lease, it was subject to confiscation as to its rents and profits, and also to such legislation as the United States might see fit to adopt, and the officers of the army were not authorized to alter the status of the property in these respects, and subject the United States as tenants to a title which was made invalid by circumstances known both to the officers and the alleged grantee and lessor. *Filor v. United States*,* 3 Ct. Cl., 25.

§ 180. Where judgment in ejectment was obtained against an agent of the United States holding in the name of the government land of the plaintiff, *held*, that such judgment destroys all presumption of implied contract and all claims of plaintiff for implied rent based thereupon. *Langford v. United States*,* 12 Ct. Cl., 338.

§ 181. Where a building was rented on behalf of the government, for three years, at a certain rent, but "subject to an appropriation by congress for the payment of the rental," the government is not liable beyond the will of congress. And though the building be occupied for the full term and appropriations made for the first two years, no action for rent can be maintained for the third year unless congress make appropriations for that year. *Bradley v. United States*,* 13 Ct. Cl., 166.

§ 182. Where, under such a lease, appropriations having been made for two years, congress directs that the building be delivered up unless the owner is willing to accept a smaller rent for the remaining year, the owner will be deemed to have assented to the reduction, unless he demands possession of the premises. *Ibid.*

§ 183. Where the government takes property for temporary purposes, the owner has a cause of action for implied rent; but if the land be taken in perpetuity, as for an Indian reservation in accordance with the terms of a treaty, the relation of landlord and tenant does not exist by implication. *Langford v. United States*,* 12 Ct. Cl., 338.

§ 184. Where the United States entered upon land under an agreement to purchase, and occupied the land some time before the agreement was consummated by a valid conveyance, *held*, in suit to recover compensation for use and occupation during the period between the first entry upon the land and the delivery of the deed, that the relation of landlord and tenant did not exist by reason of the contract of sale, and that there was no implied contract of lease. *Carpenter v. United States*,* 6 Ct. Cl., 156.

§ 185. One S. entered into an agreement with C., collector of the port of San Francisco, to lease a building to the government for fifteen years, at a rent to be determined by the collector when the building should be finished. This agreement was approved by M., secretary of the treasury, on the condition that "the rate of rent to be paid for the building be agreed upon by the collector subject to the approval of the secretary of the treasury." C. having fixed the rate of rent at \$2,000 per month for fifteen years, and the secretary of the treasury having disapproved of the contract, a new agreement was entered into between S. and K., then collector, fixing the rent at \$1,500 per month for ten years. This agreement was approved by T., then secretary of the treasury, on condition that K., on his arrival in San Francisco, should accept the building as being of the character described in the former articles of agreement. The building was approved by K., and the government entered into possession. K., at the time of

making the contract with S., had only been sworn in the state of New York, but at the time of accepting the building had been sworn within his district, as the law required. The rent was paid by the government until G., a new secretary of the treasury, declared the lease a nullity, and had the building abandoned. Whereupon the lessor took possession of the building, leased a part of it, and used the rest as a warehouse, his receipts from these sources being credited to the United States as so much received as rent from them on the original lease. Upon suit by the lessor to recover the balance of the rent accruing after the abandonment by the government, *held*, that neither the change made in the agreement by K., nor the fact that at the time he had not been sworn within his district, affected the validity of the lease, and that, therefore, the lessor was entitled to recover. *Cross v. United States*,* 1 Ct. Cl., 347.

§ 186. *Miscellaneous*.—An agreement for a lease of certain premises was made by the plaintiff to the defendant K., in 1839, and subsequently E., in 1841, in pursuance thereof, agreed to lease the same to the said K. and to W. for ten years, the annual rent being fixed by the award of referees, made in virtue of said last agreement, at \$4,650. K. then took possession, and occupied the premises until 1842, when E., claiming to be owner, conveyed the premises to K. Six days later the plaintiff filed with K. a notice of his claim thereto, and subsequently K., as owner, agreed with himself and W., as proprietors of the Boston Museum, to reduce the rent to \$3,000 and taxes. Upon bill filed by plaintiff, *held*, (1) that the agreement by E. was a present demise for ten years, as no further act of demise was contemplated, and K. had taken possession under the agreement; (2) that K. was liable for the full rent of \$4,650, as the reduction by K. of the rent originally fixed by referees after notice of the plaintiff's claim, and without his consent, was an act which, not being for the plaintiff's benefit, would, in the event of the establishment of his claim, be unauthorized. *Jenkins v. Eldredge*, 3 Story, 325.

§ 187. Where R., holding real estate as tenant for life under a will which gave her also a power of sale upon certain conditions, leased the property as executrix and trustee under the will, in 1825, to N. for twenty-one years, the lessee to pay her during the term, if she should so long live, and after her death, for the residue of the term unexpired, to P. a certain yearly rent, and then two years afterwards, in pursuance of the power of sale, conveyed the same real estate, as executrix and trustee under the will, in fee to H., *held*, that the demise to N., although void as a conveyance under the power in the will, was good as a conveyance of the interest R. had as tenant for life, and only void for any surplus of the term unexpired at her decease; that the lease operating only to convey the vested interest of the lessor during her widowhood, created no impediment to the exercise of the power of sale in 1827, when the property was sold to H. *Waldron v. Chasteney*, 2 Blatch., 62.

§ 188. A lease giving the lessee "the exclusive right to use the public wharf for his ferry boats" does not authorize him to charge wharfage as to other vessels mooring there, although he might have trespass against any one obstructing his privilege. *Russel v. The Brig Empire State*, Newb., 541.

§ 189. If a tenant has occupied and paid rent annually, and has continued into a new year, it is evidence of a new demise for one year; so if he had paid rent monthly, it would be a demise for a month. *Hooff v. Ladd*, 1 Cr. C. C., 167.

§ 190. Where a trustee holding the legal title to real property authorizes by parol the parties in interest to lease the premises and receive the rents to their benefit, and they lease accordingly in their own names, an action for the rent will lie if brought in their own names instead of by the trustee. *Hoover v. United States*,* 3 Ct. Cl., 308.

§ 191. In ejectment upon re-entry for nonpayment of rent by tenant in fee, the plaintiff need not show that his own title was in fee, if he shows a possession of forty-four years; nor that there were not sufficient goods on the premises, within the first thirty days after the rent became due, whereof distress might be made; nor that he demanded the rent on the day it became due; nor on what part of the lot the rent was demanded. *Cooke v. Voss*, 1 Cr. C. C., 25.

§ 192. A *feri facias*, received by the marshal before an attachment for rent not due, is entitled to priority and must be first satisfied. *Stieber v. Hoye*, 1 Cr. C. C., 40.

§ 193. Where, by the terms of a grant, each grantee was to pay annually for the first ten years an ear of corn, rent, for his share of the land, if lawfully demanded, *held*, that this was a mere nominal rent, and its non-payment not a ground of forfeiture. *People of Vermont v. Society*, 1 Paine, 652.

§ 194. Where an action is brought in the District of Columbia under the "landlord and tenant" act, thirty days' notice to quit having been given, it is no defense to the action that the plaintiff acquired his title by purchase at a sale of the premises made by power given in a deed of trust, even though the execution of the power was defective. *Fisk v. Bigelow*,* 2 MacArth., 427.

§ 195. A deed of trust was given in the District of Columbia, to secure payment of a debt,

with power to sell in case of default in payment. The land was sold by the trustee, and the grantor in the trust deed continued in possession. *Held*, that under the statute "to regulate proceedings between landlord and tenant," such grantor became tenant at sufferance to the purchaser, and upon being served with notice of thirty days to quit, he was liable to the summary process furnished by the act. *Luchs v. Jones*,* 1 MacArth., 345.

§ 196. While New Orleans was occupied by the military forces of the United States during the war of the late rebellion, the commanding general appointed a mayor and boards of finance and of street landings. In pursuance of a resolution of these boards, the mayor leased water front property in the city for ten years. By the terms of the lease large outlays were to be made by the lessee, and the property with all improvements to be turned over to the city at the expiration of the term. In less than a year from the making of the lease the city government was surrendered to the proper city authorities, and the rent notes given by the lessee were handed over to the city, one of which was afterwards collected by the city. Afterwards the city attempted to annul the lease. *Held*, that under the *peculiar circumstances* of the case the lease must be sustained for the entire term of ten years, if not upon the principle that the city was estopped from denying the validity of the lease by receiving payment of one of the notes, notwithstanding the fact that the military department of Louisiana issued an order seven months after the making of the lease forbidding officers in control of cities by military appointment from disposing of city property beyond the time when the civil government of such cities should be restored. *New Orleans v. Steamboat Company*, 20 Wall., 387.

§ 197. If there be a lease for years, in the city of Washington, with right of re-entry for non-payment of rent, and six months' rent be in arrear, and no sufficient personal property on the premises to countervail the rent arrear, the lessor may, under the statute of 4 Geo. 2, ch. 28, which is in force in the county of Washington, recover in ejectment, as if he had made a strict demand of the rent, and had entered; but the lessor cannot recover while the lease is in full force; and it is in full force, unless forfeited by the right of re-entry, and the proceeding to serve a declaration in ejectment according to the provisions of that statute, six months' rent being in arrear and not sufficient goods on the premises to countervail the rent. *Bradlay v. Conner*, 5 Cr. C. C., 615.

II. WASTE.

SUMMARY—*English statutes*, § 198.—*Permitting and committing waste*, § 199.—*Tenant at will*, § 200.—*Tenancy from year to year*, § 201.—*Waste by a stranger*, § 202.—*Extent of liability of tenant*, § 203.—*Accidents*, § 204.—*Occupying part of building*, § 205.—*Damages to adjoining premises*, § 206.

§ 198. The statutes of Marlebridge and Gloucester, on the subject of waste, form a part of the common law, brought to this country by the colonists. *Parrott v. Barney*, §§ 207-14.

§ 199. Under the statutes of California, *permitting waste is to commit waste*. *Ibid*.

§ 200. A tenant at will is not liable as tenant, but as a trespasser, for the commission of voluntary waste. For permissive waste he is not liable at all. *Ibid*.

§ 201. A tenancy from year to year is a tenancy for a definite recurring period and not at will. Thus if a tenant have a certain time in the premises, be it for a day or a thousand years, he is a tenant for years, and, as such, liable for waste. *Ibid*.

§ 202. For waste committed by a stranger during the term of the tenant, the landlord may sue either the tenant or the stranger. *Ibid*.

§ 203. A tenant, without some special agreement to the contrary, is liable for all waste, except it be occasioned by the act of God, the public enemy, or by the reversioner himself. The liability does not depend upon mere negligence, but is imposed for reasons of public policy. *Parrott v. Barney*, §§ 215-19.

§ 204. Where the lease exempts the tenant from liability for damages by the elements, but requires him to surrender the premises at the end of the term in as good condition as the reasonable use and wear thereof will permit, he is still liable for waste resulting from accidents, although occurring without his fault. So, where the tenant covenants to occupy for a particular business, he is liable for accidents incident to such business. *Ibid*.

§ 205. To render a tenant liable for waste, it is not necessary that the subject of the demise should be land. A tenant is liable for waste where he occupies only a part of the building. *Ibid*.

§ 206. The liability of tenants for damages to adjoining premises of their landlord, resulting from an accident occurring upon the demised premises, is not affected in any way by reason of the tenancy. Their liability in such case is to be determined the same as if they were the owners in fee of the premises occupied by them. *Ibid*.

[NOTES.—See §§ 220-225.]

PARROTT v. BARNEY.

(Circuit Court for California: Deady, 405-412. 1868.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action was commenced on March 20, 1867, in the twelfth district court of the state. On August 21, 1867, the defendants appeared to the action by attorney and petitioned to have the cause removed to this court. On September 21, 1867, the state court made an order allowing the petition for removal.

The action has been tried in this court upon the complaint of the plaintiff and the demurrer of the defendants thereto. The complaint contains three counts: From the first count it appears that on April 16, 1866, the plaintiff was the owner in fee of certain premises in the city of San Francisco, at the corner of Montgomery and California streets, and that the defendants then occupied and possessed certain portions of said premises, under the plaintiff, "as his tenants thereof from year to year at and under a certain yearly rent" — the reversion thereof being in the plaintiff.

That the defendants during such occupation and possession, at the date aforesaid, "by themselves and their servants, carelessly, negligently, improperly and improvidently introduced, and caused and procured to be introduced, and suffered and permitted to be introduced," into the premises certain explosive substances, which, by themselves and servants they so carelessly, negligently, etc., handled, managed, etc., "that the same then and there exploded with great force and violence, and then and there by means and force of the said explosion, broke down, wasted and destroyed divers," etc., "being parcel of the freehold of the said premises so held by them, the said defendants," of the value of \$20,000, to the waste and injury of the reversion of the plaintiff and his damage \$20,000, and "against the form of the statute in such case made and provided."

The second count alleges that a certain portion of the premises above mentioned, at the date aforesaid, were in the occupation and possession of Gerrit W. Bell and the Union Club, as tenants of the plaintiff from month to month, the reversion thereof being in the plaintiff; and that the defendants doing business as aforesaid, in premises in the immediate vicinity of those occupied by Bell and the Union Club, caused and suffered the explosion above mentioned to take place, by means whereof there was broken down, wasted and destroyed divers, etc., being parcel of the freehold of the said premises occupied by Bell and the Union Club, of the value of \$30,000, to the waste and injury of the reversion of the plaintiff and his damage \$30,000.

The third count alleges that a certain portion of the premises was held and occupied by the defendants, at the date aforesaid, as tenants thereof to the plaintiff, under a certain demise and rent, and that Gerrit W. Bell and the Union Club occupied a certain other portion of the premises as tenants of the plaintiff, the reversion thereof being in the plaintiff; and that the defendants, while occupying the premises aforesaid, caused and suffered the explosion above mentioned to take place, by means whereof there was wasted and destroyed divers, etc., portions of the premises, to the injury of the reversion of the plaintiff \$50,000. The complaint concludes with a prayer for treble damages upon the first count, and single damages upon the others — in all \$100,000.

§ 207. *Where a demurrer is taken to the whole complaint, if either count is good, the demurrer will be overruled.*

The demurrer is taken "to the complaint," and not any particular part of it. The causes of demurrer assigned are the same as to each count: that it does not state facts sufficient to constitute a cause of action. If either count in the complaint is sufficient, the demurrer, being to the whole, must be overruled. 1 Chit. Plead., 664, and note; Weaver v. Conger, 10 Cal., 237.

§ 208. *The statutes of Marlebridge and Gloucester, on the subject of waste, are a part of the common law, brought to this country by the colonists.*

It seems that, by the ancient common law, tenants were not liable to an action for waste, except those who were in by operation of law — as tenant in dower or guardian in chivalry. To protect the inheritance against the waste of tenants in, by act of the parties, whether for life or years, the statute of Marlebridge was passed. 52 Hen. III., c. 23, year 1267. This statute provided: "Also fermers during their terms shall not make waste, sale or exile of house, woods and men, nor of anything belonging to the tenements, that they have to ferm, without special license had by writing of covenant making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damages and shall be punished by amerciament." Chit. Stat., vol. 1, pt. 1, 3.

This statute proving insufficient, the statute of Gloucester was passed. 6 Edward I., c. 5, year 1278. This statute provided: "That a man from henceforth shall have a writ of waste in the chancery against him that holdeth by the law of England, or otherwise, for term of life or for term of years or a woman in dower; and he which shall be attained of waste shall leese the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at," etc. Chit. Stat., vol. 1, pt. 2, 1106.

These ancient statutes are a part of the common law, brought to this country by the colonists from England. When the migration to America began, they had been in force in the mother country for four centuries, and were then practically as much a part of the English common law as the oldest traditions of the courts. Com. v. Knowlton, 2 Mass., 534; Sackett v. Sackett, 8 Pick., 314; 4 Kent's Com., 81. These statutes were construed to comprehend *permissive* as well as *commissive* waste. To *do* or *make* waste in a legal sense includes *negligent* as well as *voluntary* waste. The words "shall not make waste" are construed as a prohibition to *suffer* waste. An averment that waste was *committed* is supported by proof of *negligence* from which waste ensued. 10 Bac. Ab., 421-2; 4 Kent's Com., 82; 2 Black. Com., 283; 2 Saunders, 252; Robinson v. Wheeler, 25 N. Y., 259.

§ 209. *Under the statutes of California, permitting waste is to commit waste.*

In this state and at this day the remedy and compensation for waste are prescribed by the practice act (§ 250). It reads: "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, *commit* waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there *may* be judgment for triple damages." For the defendants it is argued that this section does not include *permissive* waste — the waste set forth in this complaint. The argument presumes that the phrase *commit waste* must be taken in its narrowest literal signification, and that merely *permitting* waste, or suffering it to occur, does not bring a tenant within the statute.

The California statute is a substantial condensation and enactment of sections 1, 2, 3 and 4 of the New York Revised Statutes (2 Rev. Stat., 334). These sections of the Revised Statutes are a substantial copy of the statutes of Marlebridge and Glocester, including the subsequent one of 13 Edward I., ch. 22, which made joint tenant or tenant in common liable to his co-tenant for waste.

The New York statute of waste, like its English prototype, was construed to include permissive waste. *Cook v. The Champlain Transportation Co.*, 1 Denio, 104; *Robinson v. Wheeler*, 25 N. Y., 259. This California statute must receive the same construction as the English and New York. In enacting the former, it must be presumed that the legislature intended to adopt as a part of it the current and long established construction of the latter. The statutes all use the same language: "shall not *make* waste" (Marlebridge); "be attainted of waste shall leese the thing that *he hath wasted*" (Glocester); "shall *commit* waste" (N. Y. Rev. Stat.); "*commit* waste" (Cal. Stat.).

The cases cited by counsel for defendant (*Torriano et al. v. Young*, 6 Car. and Payne, 8; *Gibson v. Wells*, 1 Bosanquet and Puller, 290; *Holt's Ni. Pri.*, 7) only go to show that at that time the action on the case was not considered a *proper remedy* for permissive waste. They do not decide that tenant for years was not *liable* for permissive waste. The action on the case had then almost superseded the writ of waste for commissive waste, but as to permissive waste it was thought by some courts and judges that *case* would not lie.

Here the distinction between common law actions is abolished, and the ancient writ of waste was never known. The statute declares who shall be liable for waste, and to whom. It also prescribes the remedy and the measure of damages. This remedy is an action against the tenant—practically an action on the case—the circumstances. The action or remedy given is as broad as the statute, and may be maintained by the party aggrieved against the tenant for either commissive or permissive waste. What constitutes waste the statutes has left to the courts and the common law to determine.

§ 210. *If a tenant at will commit waste he is not liable as a tenant, but as a trespasser; but he is not liable for permissive waste.*

The first count alleges a tenancy from year to year. Counsel for the defendants insist that this allegation only amounts to an averment of a tenancy at will, and that, therefore, defendants are not within the statute and not liable for waste. If tenant at will commit voluntary waste, he is not liable as a tenant, but as a trespasser for a trespass. The act of waste being inconsistent with such a tenure, it determines the tenancy or estate, and the tenant is deemed a trespasser. For *mere* permissive waste—a neglect or failure to keep the premises in repair—a tenant at will was never liable. His time in the premises is too uncertain for the law to impose that burden or duty upon him.

§ 211. *A tenancy from year to year is not a tenancy at will.*

The waste complained of in this count is in one sense, and it may be the only sense, permissive. It was not intentional. Yet it was the direct and immediate result of the positive act of the tenants, and I am not prepared to admit that they are not liable for it as trespassers, even if they were merely tenants at will. But I am satisfied, upon both reason and authority, that the tenancy described in this count is a tenancy for years. All that is necessary to constitute a tenant for years is that he have a certain time in the premises,

be it for a day or a thousand years. A tenancy from year to year is a tenancy for a definite recurring period, and not at will.

During each of such periods it is a tenancy for the time or term of one year. How often it may be renewed, and how long continued by such renewal, depends upon the future conduct of the parties, and is, therefore, uncertain. But for the current year—in this case the year of the alleged explosion and waste—these tenants held the premises independent of the will of their landlord. They had a *term*—a prescribed and certain time in the tenements. They were termors—tenants for a term—a time certain, and not at will. 10 Bac. Ab., 446; 4 Kent's Com., 111–117; 2 Black. Com., 147, n. 12 and 13. The defendants, being tenants for a year, are within the statute giving the action for waste, and are, therefore, liable to the person aggrieved for waste done or suffered by them during their term.

As to waste arising from non-repair merely, the liability of tenant for years would materially depend upon the duration of his term. Between a tenant for a term of one hundred years and one year, I think there should be a marked difference in this respect. But a tenant for one year or one day ought to be liable for waste which results directly from his negligent or unskillful manner of using the property. In the one case the tenant is merely passive, but in the other, in doing a lawful act, without lawful care or skill, he causes affirmative and positive injury to the premises. For instance, a tenant for a term of one year negligently leaves the orchard gate open, so that the beasts of the field enter and destroy the trees, or in conducting water to the garden he negligently or unskillfully allows the stream to undermine the dwelling-house, so as to overthrow it. Technically speaking, this may be what the books call permissive waste—I suppose it is. The result was not intended, but produced by negligence or want of skill. Yet a tenant ought to be liable for such waste without reference to the length or duration of his term. Because it is produced not by a failure to repair, but by positive misconduct. The first count is sufficient, and the demurrer, being taken to the whole complaint, must therefore be overruled.

§ 212. *Where waste is committed by a stranger during the term of the tenant, the landlord may sue either the tenant or the stranger.*

But, in my judgment, the second and third counts are also good. The second count is simply an action on the case by one who has the inheritance against a stranger, for waste on the demised premises during the term. It having been shown, in the consideration of the first count that the injuries complained of amounted to waste, for which the tenants were liable to the landlords, whether committed by themselves or others, it follows that the action can be maintained by the landlord against either the tenant who suffered the waste or the stranger who committed or caused it. 6 Con., 328; *Short v. Wilson*, 13 Johns., 37; *Attersol v. Stevens*, 1 Taunton, 198.

§ 213. *In an action for waste, an allegation that the defendants held certain portions of the premises as tenants thereof to the plaintiff, under a demise to them, for a certain rent, is sufficient.*

The special objection to the third count is, that the tenancy is not sufficiently alleged. The allegation is substantially that the defendants held certain portions of the premises as tenants thereof to the plaintiff, under a demise to them, and for a certain rent. The allegation is an unqualified averment that there was a lease to the defendants for a certain rent, payable to the plaintiff,

who had the inheritance and immediate reversion. True, it does not affirmatively appear that the lease was for a term of years, and it *may* have been at will; but the most reasonable conclusion is, that the allegation imports a tenancy for a term. *Robinson v. Wheeler*, 25 N. Y., 263.

§ 214. *In passing upon the sufficiency of a complaint at common law, the court does not notice the prayer for relief.*

In the course of the oral argument upon the demurrer, the prayer of the complaint was criticised. In passing upon the demurrer I have paid no attention to the prayer of the complaint. In a common law action the demand for relief is a mere matter of form, except it be considered in the light of a proposition to the adverse party. What relief the plaintiff is entitled to will depend upon the facts stated and the law arising thereon, and not the prayer. Upon this complaint the plaintiff, being entitled to recover something, must have damages commensurate with the injury which the proof may show that he has sustained in consequence of the waste. An action for waste cannot be maintained unless authorized by the statute. The court will take notice of the statute, and the complaint need not notice it or conclude against the form of it. A verdict for the plaintiff should, as in ordinary actions for tort, be for the amount of damage actually sustained. The judgment of the court, by authority of the statute, *may* be given for treble that sum, or not, depending upon the circumstances of aggravation or mitigation that attended the commission of the waste.

PARROTT v. BARNEY.

(Circuit Court for California: 2 Abbott, 197-231; 1 Sawyer, 423-456. 1870.)

STATEMENT OF FACTS.— Action by Parrott against Barney and others, composing the firm of Wells, Fargo & Co.

The first count (founded upon the statute) was by the plaintiff as landlord, against the defendants as tenants from year to year, to recover for technical waste. The waste was charged to have resulted from negligently introducing nitro-glycerine upon the premises, the explosion of which had injured them. The second count was in the nature of case at common law, by the landlord against a stranger, for injury to the plaintiff's reversionary interest in adjoining premises, also owned by the plaintiff, and leased by him to one Bell and the Union Club. The injury was alleged to have resulted from negligence in introducing the explosive substance. The third count was also in the nature of case at common law, by the landlord against his tenant for waste, and also for injuries resulting from the same acts, sustained by the reversion in the other premises demised to other tenants. The fourth count was for waste committed upon the premises demised, and for injuries committed by defendants *vi et armis*, to the premises demised by plaintiff to Bell and the Union Club.

The answer denied the material allegations of the complaint; set forth the lease under which the defendants held the premises, and alleged that defendants had the right thereunder to carry on the business of expressmen in the demised premises; also that, before suit brought, the defendants had repaired the demised premises to the plaintiff's satisfaction and with his approval. The following is a summary of the facts proved:

The defendants constituted an express company. The plaintiff was, prior to

the date of the casualty, owner of land and buildings in San Francisco. The defendants held and occupied, under a lease from the plaintiff, a portion of these premises described in the lease as "The basement and first floors contained in that certain granite building, situate, etc., together with all vaults and permanent banking fixtures therein contained; together with the use of a brick warehouse in the rear, thirty by sixty feet, and the right of way and free passage thereto through the back yard of said premises, and all appurtenances thereunto belonging."

The lease contained the following covenants on the part of defendants: "It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will during the term of this lease occupy the premises solely for the business of their calling, to wit, banking and express office, and that they are not to underlet the same to any other person or persons, for any other business, in part or the whole, without the prior consent in writing of the party of the first part." The defendants also covenanted "at the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted."

In April, 1866, one Bell, as tenant from year to year, occupied a portion of the buildings, to wit: "The first or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also a corporation called "The Union Club of San Francisco," as tenant of plaintiff, was in the possession and occupation of the remaining portions of the premises, being the whole above the first or lower floor of all the said buildings and premises. The portion of the premises occupied by defendants had been used for their banking and express business from the commencement of the term down to and including April 16, 1866.

The defendants were carrying on the business of public express carriers throughout the states and territories of the Pacific coast; also between New York and San Francisco, by the way of the Isthmus of Panama.

On the afternoon of the last regular day for a steamer of the line used by defendants to leave New York for Aspinwall, prior to March 14, 1866, and after the steamer had left, a man brought to Pier No. 42, North River, a case, and asked O'Leary, the freight measurer on Pier No. 42, to receive it. O'Leary informed him that they did not receive freight on the day of the steamer's sailing. The man said it would be hard to require him to take it back, etc., and O'Leary told him that, since he had brought it so far, he could leave it there at his own risk, but that he could not give a receipt for it on that day; the party must come the next day and get a receipt. The party carried in the case and placed it opposite the freight office on the dock. O'Leary noticed that the case had not been marked, weighed, or strapped as required by defendants' regulations, and called the party's attention to these facts; whereupon he requested O'Leary to weigh, mark and strap the same, saying that he would pay for it. O'Leary, in pursuance of the party's directions, marked upon the box the address. He also strapped the case, driving the nails through the hoops or straps into the case as required by the defendants' regulations. The case lay there ten days, till the next steamer left. Two days after the

case had been left, the party who brought it applied to O'Leary for a receipt. Middlebrook, the tally clerk, and the proper party to give the receipt, did so in the presence of O'Leary.

At the time the case was presented, it was clean and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defendants was, it required strapping, weighing and marking.

The usual course of business in receiving such freight was, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight, till it was carried on board ship and stowed by the stevedores. This case took the usual course in these respects. The party receiving the receipt was accustomed to present it at the office to the express receipt clerk, who would take it up, and from it make out the ordinary express receipt, and deliver it to the shipper. In this instance, the receipt thus given by Middlebrook was surrendered, and the usual express receipt given. The receipt given by the tally clerk (such as that given by Middlebrook in this instance) on the delivery of the freight was the original from which the express receipts, bills of lading, manifest, and all others are made up. The clerk making out the express receipt for the shipper or the bill of lading, as the case may be, was always governed by this original, and he did not see or inspect the freight itself. After express matter was thus delivered, and the said original receipt given to the party delivering it, it was allowed to go into the general mass of freight of that kind, and to remain there till taken on board the steamer.

At the time of the delivery of the case and the taking of the receipt, there was nothing said about the contents of the box, nor, so far as appeared by the evidence, was anything said at any time to the defendants, or any of their employees. No questions were asked as to its contents, and no information given.

The case was shipped with other express freight, on the steamer that left New York on March 21, 1866. At that time the defendants sometimes carried to California as many as six thousand packages, put up in cases of a similar character and appearance, per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places, and a fair average of such packages of merchandise, shipped to California by each steamer, was from four to five thousand. The steamer from Panama, connecting with the steamer which left New York on March 21, arrived in San Francisco in due time, on April 13 or 14, having the case on board.

On the afternoon of the 14th, the case was placed upon the wharf, and was found to be leaking. The substance leaking from the case had the general appearance of sweet or salad oil. The case was left on the wharf till the morning of the 16th of April, when, in pursuance of the regular and ordinary course of defendants' business, where express freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silverware, which had been stained by the substance leaking from the case, and appeared to be in a damaged condition, was sent to defendants' office, the premises in question, for examination, and the steamship company was notified to send an agent to be present and examine the package in conjunction with an agent of defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the steamship company. The pack-

ages were taken to the premises by defendants' servants, and deposited in the court or yard, in the rear of the express office, and between it and the premises occupied by Mr. Bell, which was the usual place of examination of such packages when found to be damaged.

About 1 o'clock, P. M., Mr. Havens, as the representative of the Pacific Mail Steamship Company, and Mr. Webster, of the defendants, in company with another of defendants' employees, and in the presence of Mr. Knight, the second person in authority in the management of defendants' business on the Pacific coast, with a mallet and chisel proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel the substance contained in it exploded, instantly killing all the said parties and one or two others, besides destroying and greatly injuring the premises in question in the manner described in the complaint. The plan and mode of opening and examining the case in question was the same usually adopted in the ordinary course of the defendants' business in respect to packages of similar apparent character.

Upon a subsequent examination and experiment with liquid which had leaked from this case, it was ascertained that the substance contained in the package was nitro-glycerine, or glonoin oil. The case contained some thirty gallons of nitro-glycerine.

The testimony showed that nitro-glycerine is, when pure, a nearly colorless substance, but when impure is nearly the color and consistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion, and concussion, and by a high degree of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding by applying a flame to it, while the flame is in actual contact, but when the flame is withdrawn it will cease to burn. Although it will burn while in contact with flame, yet it takes fire with difficulty, and is not, in the common sense of the term, apt to take fire. It is not dangerous from the mere application of flame — as the flame of a candle, — but in explosion, combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some three hundred and sixty degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a closed vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure, or the application of force, is the immediate cause of the explosion.

Nitro-glycerine, as a blasting agent, had been only very recently brought to notice; and its properties were not generally understood, until after this accident and some subsequent ones awakened public attention. Previous to this occurrence, nitro-glycerine was generally unknown to the public as an article of commerce; and was unknown to parties engaged in the business of transportation; and at that time there was no oil or liquid of an explosive character like nitro-glycerine, known to commerce; and even among scientific men, the properties of nitro-glycerine were not so well understood as at present. Neither the defendants, nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine or glonoin oil, or that it was dangerous.

There was no proof of actual negligence on the part of the defendants in receiving the package, or in their failure to ascertain its dangerous character; nor, in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, were they chargeable with negligence in the handling of the package at the time of the explosion. The defendants either repaired or paid for the repairs (to the amount of about \$6,000) of the premises occupied by themselves, except a portion of certain repairs made by plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which defendants omitted to pay for by mistake.

Opinion by SAWYER, J. (after stating the facts).

As to the waste upon the premises demised to the defendants, I think that, upon the facts found, the defendants are liable; although, as will hereafter appear, there was, in my judgment, no negligence on their part. There was, doubtless, fault on the part of those who delivered the explosive substance to defendants for carriage over their express route, without informing them of the dangerous character of the article, for which they may be liable to defendants.

§ 215. *Liability of tenant for waste.*

The rule seems to be established, that, with respect to liability for waste, the tenant is in a position analogous to that of a common carrier, and, without some special agreement to the contrary, responsible for all waste, however or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. 4 Kent, Com., 77; *Attersol v. Stevens*, 1 Taunt., 182; *Cook v. Champlain Transportation Co.*, 1 Denio, 91; 2 Eden, Inj., 198, and notes. In *White v. Wagner*, 4 Harr. & J., this doctrine was carried out in an extreme case. The tenant is held responsible to the landlord, and left to his remedy over against the delinquent party. The liability does not depend on mere negligence, but it is imposed on the same grounds of public policy as those upon which the strict liabilities of common carriers are made to rest.

§ 216. *Where the lease exempts the tenant from liability for damages by the elements, he is still liable for waste resulting from accidents; so, where the tenant covenants to occupy for a particular business, he is liable for accidents incident to such business.*

It is claimed in this case that the covenant in the lease "at the expiration of the term to quit and surrender the said demised premises . . . in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted," is a waiver of the tort; that it only binds the defendants to reasonable care, and protects them from liability for waste resulting from accidents occurring without their fault. Also, that the covenant to "occupy the premises solely for the business of their calling, to wit, banking and *express* offices, and that they are not to underlet the same to any other person or persons for any other business in part or the whole without the prior consent in writing of the plaintiff," both entitles and requires the defendants to occupy the premises as an *express* office, and that by authorizing and requiring the defendants so to occupy, the plaintiff took upon himself all the risks incident to such business, not resulting from the wrongful act or negligence of the defendants; and that the accident in question is one of the risks so incident to the business, and for which defendants are not liable. After

some hesitation I conclude that neither of these positions is tenable. As to the first, one or two authorities seem to favor that view, but the weight of authority appears to be the other way. The authorities cited to sustain the latter proposition do not appear to me to be applicable to the facts of this case. If the defendants' counsel is correct in his position, I do not perceive why a tenant, who is to occupy the premises for a lawful purpose, in accordance with the terms of his lease, should be liable in any case for waste resulting from the wrongful act or negligence of a stranger, he himself being faultless. This would be totally inconsistent with the rule as stated in the authorities already cited.

§ 217. *A tenant is liable for waste where he occupies only a part of a building.*

It is also insisted that no waste can be found where the *land itself* is not the subject of the demise, and that, as defendants were only tenants of the basement and first story, there could be no waste. It does not appear to me that the authorities cited go to that extent. There may be a freehold estate in apartments. 1 Greenl. Cruise, 49, § 21. The absolute destruction of the basement and first floor, demised to defendants in the building described in the complaint, falls clearly within the defendants' own definition of waste, viz.: "Waste is a spoil and destruction of the estate, either in *houses*, woods or *lands*, by demolishing not the temporary profits only, but the very substance of the thing." Here is the destruction of the substance of a house, and even of land, in the legal sense of the term, which embraces the building. The result is that the defendants are liable for the waste on the premises demised to them.

§ 218. *Liability of tenant for damage to property not occupied by him.*

As to the premises demised to other tenants, the question of liability depends upon entirely different principles. The action is not based upon the covenants in the lease to defendants, and it is, therefore, unnecessary to inquire whether there was a breach of the covenant in that lease, not to introduce into the premises demised to defendants any articles "dangerous from their combustibility." And I do not perceive that the relation of landlord and tenant, between the plaintiff and defendants, as to other premises than those injured, has any bearing unfavorable to the defendants upon the question of their liability. The defendants, in my judgment, stand in this kind of action in no worse position as to the premises occupied by Bell and the Union Club, than they would have been in had the explosion taken place upon premises of which they themselves were seized in fee, and destroyed the adjoining premises leased by plaintiff to said Bell and the Union Club.

What then are the rights and responsibilities of the parties upon the facts, considered as strangers to each other, with respect to those premises? If the defendants are liable, it must be upon one of two grounds: either, *firstly*, that a party who introduces upon his own premises a highly dangerous substance, which, in consequence of such introduction, in some way injures his neighbor, is liable for the damages at all events, and under any and all circumstances, without regard to fault or negligence; or *secondly*, that the injury has been caused through the negligence and want of proper precaution and care in the party in introducing, or in managing such a substance after its introduction. Plaintiff's counsel insist that defendants are liable upon both grounds.

In support of the first ground, the strongest case cited is *Fletcher v. Ryland*, Law Rep., 1 Exch., 265; and the same case in the house of lords on appeal, affirming the judgment of the court below. Law Rep., 3 App. Cas., 330. The

defendant in that case constructed a reservoir to supply water for a mill situate upon his own premises, into which he diverted from their natural course the waters of a stream. In the construction of the reservoir, the engineer and workmen found five old shafts, which had been filled up with marl and clay. The shafts led down to certain passages, which had been excavated in working a coal mine, and which extended to, and connected with, the mine of the plaintiffs on their own premises, adjacent to those of defendant. The defendant was not aware of the existence of either the shafts, or passages on his premises, but his workmen and engineer, in constructing the reservoir, found the shafts, although they did not know with what they connected. The water from the reservoir broke through one of the shafts, ran through the passages into plaintiffs' mine, and produced the injury in question in the action. The court found, as a fact, that *there was negligence* on the part of the defendant's engineer and workmen in the construction of the reservoir; but the decision was not put on that ground. The defendant was held liable, and it must be admitted that the court stated broadly that when a party brings an article upon his premises *known* to be dangerous, and liable to escape upon his neighbor's premises and do injury, he is bound to see that it does not escape and do harm.

The other cases cited are cases where parties in blasting with gun or blasting powder upon their own premises have thrown rock upon and injured their neighbors, or their neighbors' premises, and cases of a similar character; as *Hay v. Cohoes Co.*, 2 N. Y., 159.

The observations of the judges in delivering their opinions must be considered with reference to the facts of the cases decided. In all these cases, and in the examples cited by the judges as illustrations of the principle adopted, the liability to escape and do injury, and the dangerous character of the article introduced, were necessarily known to the party introducing it. The properties of water and gunpowder are known to everybody. The liability of water collected in large bodies to escape through pressure, and of gunpowder to violently explode and do injury, are known to all persons of common sense in civilized communities, no matter how ignorant they may be in literary and scientific matters. It is a part of the common and general knowledge of the community, of which everybody is presumed to be possessed, and of which, as such, the courts are bound to take judicial notice. Any party who introduces these things into his premises does so with a full knowledge of their dangerous properties, and of their liability, even with the utmost care and precaution, to elude his vigilance, baffle his control, and escape and injure his neighbor.

It is worthy of attention that in the case of *Fletcher v. Ryland*, in the court of exchequer, two of the judges were of opinion that defendant was not liable, and judgment was entered in accordance with this view; but the judgment was reversed on appeal in the exchequer chamber, and this last judgment affirmed in the house of lords. Blackburn, J., who delivers the opinion of the court in the exchequer chamber, does not fail to note *knowledge* on the part of defendant of the liability to escape and do mischief, as an important element to be considered on the question of liability. He says: "It seems but reasonable and just that the neighbor who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, *but which he knows* to be mischievous, if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not suc-

ceed in confining it to his own property." 1 Law Rep. Exch., 280. And his illustrations clearly show that *knowledge* is an important element in the liability. For instance, he says that a man is answerable for damage done by the escape of his beasts into his neighbor's field, for the *grass they eat and trample on*; for this is the *natural consequence* of their escape; but he is not liable "for any injury to the persons of others, for our ancestors have settled that it is not the general nature of horses to *kick* or bulls to *gore*; but if the owner *knows* that the beast has a vicious propensity to attack man he will be answerable for that. Id. Again, he says, "so in *May v. Burdett* the court, after an elaborate examination of the old precedents and authorities, comes to the conclusion that 'a person keeping a mischievous animal, *with knowledge* of its propensities, is bound to keep it secure at his peril.' And in 1 Hale's Pleas of the Crown, 430, Lord Hale states that when one keeps a beast, *knowing his nature or habits* are such that the natural consequence of his being loose is that he will harm men, the owner 'must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up safe, if he escape and do harm, the owner is liable for damages.' . . . In these latter authorities, the point under consideration was damages to the person, and what was decided was, that *when it was known* that hurt to the person was the *natural consequence* of the animal being loose, the owner should be responsible in damages for such hurt, though when it was *not known* to be so the owner was not responsible for such damages; but where the damage is, like *eating grass*, or other ordinary ingredients in *damage feasant*, the *natural consequence* of the escape, the rule as to keeping in the animal is the same." Id., 281. In affirming the judgment of the exchequer chamber in the house of lords, the lord chancellor quoted the first passage above cited from the opinion of Blackburn, J., together with the context, and said, "In that opinion, I must say, I entirely concur." 3 Law Rep. App. Cas., 340.

§ 219. *To render a party liable for damages to adjoining premises from a dangerous article introduced upon his own premises, he must be charged with knowledge of the dangerous character of such article, or there must be proof of negligence.*

Thus, it is apparent from the language used and the illustrations cited, that *knowledge* of the dangerous character or mischievous propensities of the thing or animal introduced, on the part of the party introducing it, is an essential element in the cause of action. The "natural consequences" of the escape must be *known*, but the *ordinary* natural consequences of the escape of a tame beast, as the eating and trampling down of grain, grass, herbage, etc., the damage from flooding with water, filth, etc., are matters of universal knowledge, of which everybody is presumed to be cognizant, and of which everybody is bound to take notice. Since a party is bound to know those things, the law presumes that he does know them, and holds him responsible without special allegation or proof of knowledge. But all tame animals are not vicious — the goring of a man is not the ordinary consequence of an escape of a tame beast. When such a beast is vicious and liable to attack and gore people, or do other like kinds of mischief, it is an exception to the general rule, and all mankind are not presumed to know his vicious propensities; hence, in order to render the owner liable for such mischiefs done upon an escape, it is necessary to specially bring home to him knowledge of his vicious tendency. When this knowledge is brought home to him, he is presumed to know the ordinary consequences of the escape of such animal, and is liable for his vicious

acts as in other cases of *knowledge*. I know of no case of which this doctrine has been held, unless knowledge of the propensities or character of the thing working the injury must be presumed by the law from its general known character, or knowledge was specially brought home to the party dealing with it.

Knowledge, therefore, in some form, must be an essential element in the cause of action. There is some reason for holding that a party who introduces into his premises a substance known to him, or which he is bound to know from the present universal knowledge of mankind, to be dangerous to his neighbor, shall do so at his own peril, and be responsible for the consequences. He deals with the article with full knowledge of his peril, and knowingly assumes the risk. Should he suffer, it would be in consequence of his own folly, if not his fault. But why should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. Upon what sound reason can such a doctrine be sustained? To carry the rule to that extent would be to make every man an insurer of his neighbor against the consequences of all his acts, however faultless they may be. In my judgment, the law is not so rigorous and unreasonable.

But it is not clear, that, even as to things universally known to be dangerous, the doctrine laid down can be sustained in the broad language sometimes used in discussing a given state of facts. Fire, for instance, is an element known to all men to be dangerous, yet there are numerous cases where fires purposely set in a party's own grounds have spread to and damaged his neighbor's premises, as, for example, in clearing lands, in which the party setting the fire has been held not to be liable, unless there was negligence. So in the case of water, it was held that when one builds on his own land a mill-dam, on a proper model, and the work is faithfully done, he is not liable to an action, though it breaks, and his neighbor's dam and mill are thereby destroyed. *Livingston v. Adams*, 8 Cow., 175. To the same effect are *Hoffman v. Tuolumne Water Co.*, 10 Cal., 413, and *Campbell v. B. R. & A. W. & M. Co.*, 35 id., 663. These were not cases that could be referred to *vis major*. I can perceive no good ground for distinction as to the question of liability, between thus accumulating upon one's own land water in a natural stream largely beyond the natural quantity, and introducing it from abroad. See, also, as to bursting of water pipes, *Blyth v. Birm. Water Co.*, 11 Exch., 781. These are but examples of a very large number of cases of like character. Why were not the defendants in these instances responsible for all damages resulting to their neighbors, if a party introducing or dealing with a dangerous article, thing or element upon his own premises is liable at all events, and under all circumstances, without reference to any negligence or any fault on his part? And in these cases the parties had *knowledge* of the dangerous character of the matters with which they were dealing. If I am right in the views thus far suggested, the first proposition upon which the liability of defendants for the injuries to the premises occupied by Bell and the Union Club is rested is untenable.

There must then have been knowledge on the part of defendants of the dangerous character of the explosive substance introduced upon the premises oc-

occupied by them, or there must have been what the law deems negligence on their part, or there is no liability.

Upon the question of knowledge, I am satisfied from the evidence, and I so find the facts to be, that nitro-glycerine, at the time of the explosion in question, had not become so generally known to the world, commercial or otherwise, as to be a part of the ordinary knowledge of the people, even in intelligent communities. It had hardly yet emerged from the domain of strictly scientific research. It is true, that, at the time, it had recently, to a very limited extent, been introduced to the knowledge of miners and others in Europe; but only to a limited extent. At the very time, efforts were being made by a single person to introduce it into this country for blasting purposes. A short time (but a few weeks) before, an effort had been made—and the first effort of the kind—by one house, to whom a consignment had been made, to bring it into notice in this state; but it does not appear that it had been introduced into public use in other parts of the United States. The knowledge of the article, both of its name and its properties, was confined, comparatively speaking, to a very few. Of course, it is impossible to ascertain, even approximately, the exact extent to which it had become known; but from the general tenor of the evidence, I think it might be safely assumed that not one in a thousand in the United States, or California, would have known anything about the substance or its properties, had it been mentioned by its common name, glonoin oil, or nitro-glycerine. However that may be, it is very evident that it was known outside the laboratory of the chemist to a very limited extent, and not sufficiently to be recognized as a part of the common knowledge of the country, even in intelligent circles. It was new—I might say, almost entirely unknown—to commerce. It had not obtained such notoriety that ordinary people, or commercial men, can be presumed to be cognizant of its properties. As an illustration of the state of knowledge, even among scientific men and chemists, of several professors of that science in our colleges and university, examined as experts on behalf of the respective parties, not one had heard of nitro-glycerine, as an article of commerce or of practical utility, or outside the domain of science, prior to the explosion in question in 1866. One professor, who appeared to be well informed in his profession, and as to the article in question, could not say that it had before that time been brought to his attention, even as a matter of scientific interest. Another, who had formerly been a professor of chemistry in the Normal College, in Swansea, Wales, and who has for several years been, and now is, the analytical chemist of the San Francisco Refining and Assaying Office, and professor of chemistry in the Toland Medical College, also in the City College, was so little familiar with nitro-glycerine and its properties, that after the explosion, when some of the chips, saturated with some of the substance which leaked from the case on the wharf, were taken to him for analysis, he did not know what it was. Even after he had proceeded some time with the analysis, applying various tests, and after an accidental explosion had taken place in the course of the process of analysis, the name of the article did not suggest itself to him till he had consulted his toxicological works, and found that a substance apparently having the same properties was called nitro-glycerine; yet he had years before experimented with it in the laboratory as a matter of scientific interest, but the fact had passed from his recollection. In point of fact, attention appears from the evidence to have been but little directed

towards the substance, even in the scientific world at large, until called to it by the explosion in question, the one at Aspinwall about the same time, and one or two others occurring at a later date. Since then it has been the subject of extensive experiments, which have brought to light much of the present prevailing particular knowledge with reference to its properties.

With so little general knowledge of the substance, at the time of the accident, outside the laboratory, even among chemists and scientific men, who usually take a special interest in such substances, and who are more likely to notice the progress of their introduction into the practical affairs of life, it could scarcely be expected that the public generally, engaged in the ordinary pursuits of agriculture, manufactures, and commerce, would be informed upon the subject; and I am satisfied from the evidence that the substance and its properties were, at the time of the shipment and explosion, almost wholly unknown to the public and to commerce; and further, that while the state of public knowledge was *not* such that the defendants were bound, or could be presumed in law, to know the existence or properties of the substance, I am also satisfied that they did not in fact, nor did any of their employees engaged in handling the case in question, have any knowledge on the subject; that the package was received and handled by the defendants and all in their employ, up to the time of the explosion, in utter ignorance of its contents, or the dangerous properties of the substance itself, had the contents been known; and that they had no ground to suspect its dangerous character — nothing to put them upon inquiry, as prudent men, as to what it was.

I do not perceive that the fact of the arrival of the case on the sailing day of the steamer, and after its departure, or that it was not strapped or marked, as required by the regulations of the defendants, has anything in it to suggest to an ordinarily prudent man, engaged in the business of a common carrier, that the case contained anything dangerous. It was, at most, simply indicative that the party presenting it was not acquainted with the requirements of the company, which was, doubtless, no uncommon thing with those who were not in the habit of making frequent shipments. When the defendants' servant was requested to strap the case, he obtained a wooden hoop from a pile kept for the purpose, and the proper implements at hand, and strapped it, driving nails into the box with as much unconcern as if it had been a case of boots and shoes. He evidently had no suspicion that it was liable to explode from the effect of his blows, or that it was in any respect dangerous; and the fact that hoops and implements were kept at hand for such purposes, indicates that this want of conformity to the regulations of the defendants was by no means singular — that such exigences were anticipated and provided for. The box appeared in all other respects in good condition and suitable for shipment — as much so as the thousands of others of a similar apparent character shipped by the same steamer. There was, then, in fact, no knowledge, and nothing that should necessarily excite the suspicions of a prudent man engaged in that business, and constantly receiving for carriage boxes of merchandise of similar appearance. Indeed, I think it would have been very remarkable, if one receiving and handling *so many* similar cases, upon the facts disclosed by the evidence, had suspected that it contained anything of a dangerous character.

[A part of the opinion, devoted to the consideration of the liability of a common carrier, is omitted, and the reader is referred to the subject of CAR-

RIERS, contained in this series (§§ 169-176), where the opinion of the supreme court, affirming this decision, is given in full.]

As to the premises occupied by Wells, Fargo & Co., the statute provides that, in an action for waste, "there *may* be judgment for triple damages." Prac. Act, § 250. As I understand this provision it leaves the question as to whether the damage shall be tripled to the sound discretion of the court, to be determined according to the greater or less aggravating character of the circumstances. There are no circumstances in this case to justify inflicting damages beyond the actual amount sustained. In point of fact, the defendants repaired a large portion of the premises to the satisfaction of the plaintiff, and paid the expenses themselves, and supposed they had done so as to the whole; but it turns out in the evidence that a small portion of the expense of repairs, which, from the nature of the case, could not well be made except in connection with repairs made to other premises which defendants, according to the view taken, are not liable to repair, have been overlooked, and accordingly not been paid. For this amount the plaintiff must have judgment.

Let judgment be entered for the plaintiff for the sum of \$1,787.62, and interest at ten per cent. per annum, from August 1, 1866, in gold coin, and costs of suit.

§ 220. **Destruction by fire.**—Where a lease exempts the lessee from liability on account of injury to the premises resulting from "inevitable casualties," a casualty, such as an ordinary fire, happening against the will and without the negligence or other default of the lessee, is as to him an inevitable casualty. *Hodgson v. Dexter*,* 1 Cr. C. C., 109; 1 Cr., 345.

§ 221. A public agent of the government contracting for the use of the government is not personally liable, although the contract be under seal. *Ibid.*

§ 222. Where there is a covenant in a lease that the lessee shall release and deliver the premises "in as good order as they are now, on the expiration of the lease," the tenant is bound to rebuild in case the premises are destroyed by fire. *Schmidt v. Pettit*,* 1 MacArth., 179.

§ 223. **Cutting and selling young and green wood, held,** to be such an injury to the inheritance as to amount to waste. *Thruston v. Muston*,* 3 Cr. C. C., 335.

§ 224. A tenant for ninety-nine years, under a lease renewable forever, with privilege of purchasing the reversion at a fixed price, is liable for waste. *Ibid.*

§ 225. **Discovery.**—Upon bill brought by landlord praying discovery as to waste committed by the tenant, in Maryland, the tenant is not obliged to give discovery, as the statute of Gloucester (6 Ed. I., ch. 5), being in force in that state, such discovery would entail a forfeiture. *Ibid.*

III. FIXTURES.

[See CONVEYANCES; LAND.]

SUMMARY—*Right of removal during term*, § 226.—*Erection of buildings; eviction for non-payment of rent*, § 227.—*The rule and its exceptions*, § 228.—*Usage*, § 229.—*Put in lieu of others*, § 230.—*Rights of assignees*, § 231.

§ 226. The right of a tenant to fixtures, substantial and permanent in their nature, is confined to the right of removal during the term, and does not include the right to recover their value if left upon the premises after quitting possession, unless otherwise provided by express contract. *Kutter v. Smith*, §§ 232-33.

§ 227. A lease contained a covenant for re-entry, to the effect that the lessor might enter and repossess the premises "as in his first and former estate," for non-payment of rent, and another that, at the expiration of ten years, it should be at the election of the lessor to purchase the buildings erected by the tenant on the leased premises, at their appraised value at that time, or renew the lease of said premises for the term of ten years longer. The tenant erected a brick building upon the premises, but was evicted for non-payment of rent before the expiration of the first term. *Held*, that he could not recover the value of such building. *Ibid.*

§ 228. As a general rule fixtures once annexed to the freehold cannot afterwards be removed, except by him entitled to the inheritance; but fixtures erected for the purposes of a trade are excepted from the rule, and the tenant may remove the same before the expiration of his term. Thus, where the tenant of an empty lot built a house thereon with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in the business, *held*, that as the residence of the family was auxiliary to the dairy, it was for the accommodation of this trade, and removable by the tenant. It would have been otherwise if the house had been built principally for a dwelling-house. *Van Ness v. Pacard*, §§ 234-37.

§ 229. Evidence to establish a usage or custom for tenants to remove, during their terms, buildings erected on rented premises is competent. *Ibid*.

§ 230. Fixtures put in by a tenant in lieu of others belonging to the landlord cannot be removed by the tenant. *Ex parte Hemenway*, §§ 238-42.

§ 231. Fixtures were put in by a tenant holding under a written lease, who transferred the premises during his term, such fixtures passing by assignment from tenant to tenant until they came into the hands of tenants holding after the expiration of the written lease under parol tenancies. The last tenant failed to pay rent and became bankrupt. *Held*, that he acquired title to the fixtures by assignment, and had a right to remove the same, notwithstanding the non-payment of rent and notice to quit, and that his assignee in bankruptcy had the same rights that the bankrupt had. *Ibid*.

[NOTES.— See §§ 243, 244.]

KUTTER v. SMITH.

(2 Wallace, 491-500. 1864.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.— On May 1, 1857, Link demised to Sherman a lot in the city of Chicago for a period of twelve years. There was a provision for the forfeiture of the lease for non-payment of rent. There was also a covenant (recited in the opinion) for a renewal of the lease at periods of ten years, etc., and also for the purchase by the lessor of buildings erected by the lessee. The lessee erected a building worth from \$2,500 to \$4,000. The rights of Link as lessor passed subsequently to one Smith, and those of Sherman to Kutter, and on May 2, 1862, Smith, after a demand for rent due, declared the lease forfeited. Kutter thereupon brought this action to recover the value of the building, alleging the forfeiture of the lease, etc., and the failure of the defendant to join in an appraisement of the building. There was judgment for the defendant.

Opinion by MR. JUSTICE MILLER.

If we correctly understand plaintiff's counsel, one of the positions assumed by him in argument is, that the fact that under these circumstances defendant comes into the use and possession of the building, erected by the labor and money of plaintiff's assignor, entitles plaintiff to recover the value of that building, without aid from the contract on that subject in the lease, which we will consider hereafter. The authorities cited to support this position relate to the class of cases in which tenants have been permitted to remove fixtures from the premises which they have placed there during the tenancy.

§ 232. *The right of tenant to fixtures confined to right of removal during term; it does not include right to recover their value.*

Without elaborating the argument, it may be remarked that none of these authorities are applicable, for two reasons: 1. The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable as fixtures. 2. The doctrine concerning this class of fixtures, which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while

the tenant is in possession; and has never been held to give a right of action against the landlord for their value.

We can very well understand that if defendant wrongfully entered upon the building, and retains wrongful possession of it, he may be liable to plaintiff in action of trespass *quare clausum fregit*. But as we understand the facts, there is no such wrongful entry; and plaintiff bases his right to recover upon a very different view of the matter.

There was in the contract of lease between Link and Sherman a covenant that, at the expiration of ten years from the 1st day of May, 1859, it should be at the election of the lessor to purchase the buildings erected on the leased premises at their appraised value at that time, or renew the lease of said premises for the term of ten years longer, at a rent to be appraised in like manner; and this election, on the part of the lessor, was to be exercised at the expiration of every ten years for the period of ninety-nine years. The plaintiff now contends,—because the defendant terminated the lease before the first ten years had expired, by virtue of a clause authorizing the lessor to do so for non-payment of rent,—that, therefore, defendant became liable to pay him the appraised value of the building. He accordingly gave a notice of his claim, and of his readiness to join in appointing appraisers, and then brought this suit.

It will be observed that while the right thus claimed is one growing out of the contract, and, as would reasonably be supposed, is for the failure to perform some obligation which that contract imposed, the action is neither covenant nor *assumpsit*, nor any other form of action founded on contract, but is an action on the case. And the counsel who framed the declaration objects in this court “that the court below treated the case as one in an action of covenant, to enforce, as against defendant Smith, the provision of the lease, upon the covenant upon the part of Link as to the purchase of the building at the end of the term.”

One obvious reason why plaintiff does not wish to be considered as suing on the contract is, the difficulty of holding that the covenant to purchase is one which runs with the land, or which, in any other manner, binds Smith as assignee of Link. An action of covenant would also be liable to the objection that the contingency on which the lessor was bound either to renew the lease or purchase the building had never arisen.

To avoid these difficulties, the plaintiff brings an action on the case, in which he sets out this covenant with the entire lease and the other facts of the case, and seems to suppose that, by virtue of the flexibility of this form of action, it may be found to embrace some principle which will justify a recovery. We have already seen that the law imposes upon the defendant no obligation to pay for the building apart from the contract. If the contract, when examined in the light of the facts proved, imposes no such obligation, we are at a loss to perceive what other ground of liability can be asserted against defendant.

§ 233. *A covenant in a lease to pay the value of buildings erected on expiration of term does not vest title to the buildings in lessee, nor right to recover compensation on forfeiture of lease for non-payment of rent.*

It is argued that the plaintiff's assignor became the owner, and had title or estate in the building as separated and distinguished from the land; and while the defendant had the right to enter, take possession, and hold for a failure to pay rent, that right was in some way subordinate to plaintiff's right to the house. But if we concede so singular a proposition as that the title to the

soil was in defendant, while that of the building was in plaintiff, it by no means follows that defendant is bound to purchase plaintiff's building. The utmost that can be claimed on that subject is that Smith is bound by the covenant of Link, the lessor, to purchase at the end of ten years *or renew the lease*. He may always exercise his option in favor of the latter proposition, and by the contract may never be bound to purchase. So that if the title to the building is in plaintiff, and defendant has wrongful possession of it, we revert again to the proposition that trespass, or some form of action for use and occupation, is all the legal remedy which the plaintiff has.

But we cannot concede that plaintiff or his assignor had at any time the legal title to the building as distinct from the lot. The well-settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the fault of the plaintiff and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. He had his option to pay the rent due defendant, and retain the right to payment for his building when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with full knowledge, and there is no injustice in holding him to the consequence of his choice.

The covenant for re-entry provides that, in default of payment of rent, the lessor may enter "and the said premises repossess and enjoy as in his first and former estate."

The plaintiff insists that the building is no part of such former estate, and defendant, therefore, does not become its owner by virtue of the re-entry. We have already shown that the building does become a part of the *land* as it is built. No such meaning was ever before attached to the use of the word estate in a legal document. It is used in reference to the nature of defendant's interest in the property, and not to the extent of improvements on the soil. As if the lessor had a fee-simple estate, it reverted to him again as a fee-simple. If he had a term for years, he was in again as part of his term. But it had no relation to the question of whether that estate might be more or less valuable when repossessed, or might bring to him more or less buildings.

We hold, then: 1. That without the aid of a special contract, the law imposes no obligation on the landlord to pay his tenant for buildings erected on the demised premises. 2. That treating the parties to this suit as standing in the places of the original lessor and lessee, no obligation arises from the contract in this case, that the lessor shall purchase or pay for the building erected on said premises, except as an option, to be exercised at the end of each period of ten years. 3. That the act of defendant in re-entering and possessing himself of the premises for plaintiff's failure to pay rent imposes upon him no obligation to pay plaintiff the value of the building.

As the ruling of the court to which exception was taken was in conformity to these principles, the judgment must be affirmed with costs.

VAN NESS v. PACARD.

(3 Peters, 137-149. 1829.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiff in error against the defendant, for waste committed by him while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant upon which a judgment passed in his favor, and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial, it appeared that the plaintiffs, in 1820, demised to the defendant, for seven years, a vacant lot in the city of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have the right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence that, upon obtaining the lease, he erected the building above mentioned, with the view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk-cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out of doors; and carpenter's work was done in the house, which was in a rough and unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows, of plank and timber, fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence the counsel for the plaintiffs prayed for an instruction that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant further offered evidence to prove that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence; but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the examination of the witnesses for the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the city of Washington, which authorized a tenant to remove such a house as that erected by the tenant in this case; nor

was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage; and, after their testimony was given, he prayed the court to instruct the jury that, upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant could be justified in removing the house in question; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The court was divided, and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures, erected by a tenant during his term, are removable by him?

§ 234. *Right to remove fixtures.*

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible, and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Maw*, 3 East, 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided that, in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections, solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned judges, at different periods in that country, have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East, 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The

question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But, between landlord and tenant, it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present, it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures, for the purpose of carrying on a trade or manufacture, is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII., 13, *a.* and *b.*, where it was laid down that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt, in *Poole's Case*, 1 Salk., 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade; and that he might do it by the common law (and not by virtue of any custom), in favor of trade, and to encourage industry. In *Lawton v. Lawton*, 3 Atk., 13, the same doctrine was held in the case of a fire-engine, set up to work a colliery by a tenant for life. Lord Hardwicke there said that, since the time of Henry the Seventh, the general ground the courts have gone upon, of relaxing the strict construction of law, is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added: "One reason which weighs with me is, its being a mixed case, between enjoying the profits of the land and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, etc., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, etc., is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate, notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk., 13, Lord Hardwicke said, as we have already seen, that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East, 88, the building had a brick foundation, let into the ground with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw*, 3 East, 38, Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns before Lord Kenyon, *Dean v. Allalley*, 3 Esp., 11; *Woodfall's Landlord and Tenant*, 219, is to the same effect.

§ 235. *Where a dwelling-house was built as merely accessory or auxiliary to the carrying on of a trade, it is considered such a fixture as may be removed by the tenant during his term.*

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was "that the defendant erected the building before mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted that in a business of this nature, the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another which was the principal design; and unless we were prepared to say, which we are not, that the mere fact that the house was used for a dwelling-house as well as for a trade superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns., 29, proceeds upon principles equally liberal;

and it is quite certain that the supreme court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw*, in respect to erections for agricultural purposes. In our opinion, the circuit court was right in refusing the first instruction.

§ 236. *Evidence to establish a usage or custom for tenants to remove, during their term, buildings erected on rented premises is competent.*

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom and to contract with a tacit reference to it. Cases of this sort are familiar in the books, as, for instance, to prove the right of a tenant to an away-going crop. 2 Starkie on Evidence, Part IV, 453. In the very class of cases now before the court, the custom of the country has been admitted to decide the right of the tenant to remove fixtures. Woodfall's Landlord and Tenant, 218. The case before Lord Chief Justice Treby turned upon that point. Bulmer's Nisi Prius, 34.

§ 237. — *parol testimony is admissible to establish such usage or custom.*

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration, open indeed to such commentary and observation as the court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole, in our judgment, there is no error in the judgment of the circuit court; and it is affirmed, with costs.

EX PARTE HEMENWAY.

(District Court for Massachusetts: 2 Lowell, 496-501. 1876.)

STATEMENT OF FACTS.—The bankrupt, Stevens, was assignee of a lease of a bar-room, which contained fixtures put in by a former tenant, and also gas fixtures substituted by a former tenant for others belonging to the landlord. The successive tenants held on under parol tenancies without agreement as to fixtures. Stevens was notified to quit before the bankruptcy by the landlord, who attached the property.

Opinion by LOWELL, J.

The gas fixtures come fairly within the intimation of the court in *Whiting*

v. Brastow, 4 Pick., 310, where it is said, "a padlock can in no sense be called a fixture, for it can be taken away without injuring or defacing the building. If put there by the landlord, or by the tenant in lieu of one found there, it would be the landlord's property, though not a fixture." It is proved or admitted that the gas fixtures were put there in lieu of those which the landlord had, and not because they were worn out, but that the tenant preferred a different style and appearance, perhaps more modern.

§ 238. *Fixtures put in by a tenant, in lieu of others belonging to the landlord, cannot be removed.*

The principle would not be of very extensive application, but in such a case as this the clear presumption is that the tenant gave these fixtures to his landlord, instead of those which he took out and failed to account for.

As to the counter and its appurtenances, the first question is whether, by the expiration of the term of the original lease, these fixtures became dedicated to the landlord, so that the bankrupt acquired no property in them; and the second, whether, if he had a title, it was lost before the bankruptcy.

§ 239. *Assignee in bankruptcy of a tenant is in same position as the tenant on the day the latter quits possession.*

Taking the second question first, it was admitted that the landlord's attachment was intended to hold whatever belonged to the tenant, and that any attempt on his part to remove fixtures would have been resisted by the officer, in due pursuance of his precept. The attachment having been laid by the landlord himself before the notice to quit, and having been dissolved by the bankruptcy, the assignee should be in no worse position than the bankrupt was in on the day that he quitted possession. Did the forfeiture or loss of the tenancy by non-payment of rent and notice to quit destroy the right to sever and remove the fixtures? Mr. Taylor, in a note to the latest edition of his valuable work on Landlord and Tenant, says, in general terms, that the right is determined by an entry for condition broken. Taylor, § 551, note 2 (6th ed.). Only one of the cases which he cites supports the proposition, or indeed touches on the point at all. One other case refers to emblements, but they do not seem to me very closely analogous to fixtures. *Davis v. Eyton*, 7 Bing., 154. That case is *Whipley v. Dewey*, 8 Cal., 36, in which a tenant, some time after his tenancy was ended, undertook to remove buildings which, by the agreement between him and his landlord, were removable. The true ground of decision appears to be that the right was lost by laches or non-user. The learned judge who delivered the opinion of the court says that it is well settled that a tenant cannot remove erections made by him on the premises after a forfeiture or re-entry for condition broken. He cites no cases, and I have found none to support that doctrine, unless in the same sense that no tenant can remove fixtures after his tenancy is out, which, perhaps, is all that is intended.

In *Weeton v. Woodcock*, 7 M. & W., 14, the lease was to be forfeited by bankruptcy. The tenant became bankrupt, and the landlord entered; and the assignees, three weeks after, sold the fixtures. The jury found that they had not sold them within a reasonable time; and the court sustained the verdict for the landlord, with a *semble* or suggestion in the opinion of Alderson, B., that perhaps the assignee's title was lost as soon as the entry was made. In the later case of *Stansfield v. Mayor of Portsmouth*, 4 C. B. N. S., 120, this subject was thoroughly argued at the bar. The lease there contained an agreement that certain machinery should belong to the landlord, and machinery of

all other kinds to the tenant; and the court held that the assignees of the tenant could remove his part of the machinery, though the lease was forfeited by the bankruptcy and the landlord had re-entered. They avoided deciding the point as a general one, and put it on the stipulation of the lease, or, rather, on the fact that there was such a stipulation; for there was no very apparent difference between the covenant and what the law would have been without it, its true object being merely to point out which of the fixtures belonged to the one party and which to the other. If this decision is followed in England, it will probably lead to the enunciation of a general principle in favor of the tenant.

§ 240. *Right to remove fixtures by tenant not lost by non-payment, etc.*

These are the only decisions I have had time to find, and none others have been cited to me. I am of opinion that by the law of Massachusetts the right to remove fixtures is not absolutely lost by non-payment of rent and notice to quit, and I say it with no particle of doubt. I will not dwell upon the great injustice which might be worked, especially to a tenant's creditors, if this were the law: they are obvious, and are of themselves enough to make such a rule odious, and I had almost said impossible. It will be observed that here the attachment, which effectually prevented any dealing with the fixtures, was before the notice to quit; and, therefore, to save this part of the case to the landlord, his contention must be that no tenant whose rent is in arrear can take out his fixtures, which will hardly be argued; and, besides, this was not a case of forfeiture for condition broken, but of termination of tenancy by a statutory notice. My own opinion is, that for non-payment of rent the landlord, in case of an oral demise, has his statutory right to recover the premises, and to sue and attach the property of his tenant, and that these are his only remedies, unless the tenant, having an opportunity to remove his fixtures, chooses to leave them behind when he goes out.

§ 241. *Lessee can assign fixtures. Successive parol occupancies make but one tenancy.*

Whether the fixtures were surrendered before the bankrupt's holding began is the only remaining question. It is clear that the lessee who put up these fixtures could assign them, as he did during his term. It is equally clear that any number of successive parol occupancies from year to year, or from month to month, by the same tenant, make up, when they are past, but one tenancy. *Birch v. Wright*, 1 T. R., 380; *Rex v. Herstmonceaux*, 7 B. & C., 551, per Bayley, J. And the successor of such a tenant, in the absence of evidence of any new or different contract with him, succeeds to the duties and the rights of his predecessor. *Buckworth v. Simpson*, 1 Crompt., M. & R., 834. So that the true point is whether, by the expiration of the term of the written lease, the then tenant, by holding over and continuing under terms and conditions not given in evidence, and therefore to be taken to be those of the written lease so far as applicable, lost his right or privilege to remove the fixtures which had been put in during the term of the written lease.

It has been decided that a mere holding over of a tenancy from year to year does not affect the tenant's right in this respect, and that so long as he holds under a fair claim of right *as tenant* he preserves his privilege. See *Penton v. Robart*, 2 East, 88, and the remarks in *Roffey v. Henderson*, 17 Q. B., 574; *Heap v. Barton*, 12 C. B., 274; *Minshall v. Lloyd*, 2 M. & W., 450; *Weeton v. Woodcock*, 7 id., 14.

§ 242. *Admission as to fixtures by acceptance of new lease.*

On the other hand, it has been decided that one who accepts a new written

lease of the same premises with their buildings, etc., from his landlord on the expiration of his former tenancy, has impliedly admitted that the fixtures, of which he accepts a demise, belong to the lessor. *Loughran v. Ross*, 45 N. Y., 792. Another case is sometimes cited for this proposition (*Shepard v. Spaulding*, 4 Met., 416); but in that case the tenant had made a written surrender to the landlord, who held the premises for some years, and afterwards let them to one who let them to the original tenant; and it was held that the tenant could not afterwards remove a building which he had put up during his first term.

Both these cases turn on the intent to be derived from a written instrument, and do not govern the case of a mere holding over. Upon that the following *dictum* is more pertinent: "If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and, I take it, he would be entitled to remove fixtures during the year." Per Woodward, J., in *Davis v. Moss*, 38 Penn. St. (2 Wright), 353. Those cases, I say, turn on the implied agreement of the parties; and this case finds "there was never any agreement between the landlord and tenants who succeeded said Meserve or said Roberts & Champlin in respect to said fixtures," and goes on to say that bills of sale were made of the chattels and fixtures from one tenant to the next, but without any notice to the landlord.

Under these circumstances, I am of opinion that the fixtures of the bar-room were never surrendered to the landlord.

It was said that each tenant should have severed the fixtures when he sold his lease, or whatever he did sell, and the new tenant should have re-annexed them. But the law does not compel vain and useless trouble and expense. If that would have saved the right, I am clear that it was saved without it. Judgment, that the landlord owns the gas fixtures, and the assignee those of the bar-room.

§ 243. *Shed, right to remove.*—Held, that a tenant may, during the term, remove a wooden shed erected by him, with posts inserted two feet into the ground. *Krouse v. Ross*,* 1 Cr. C. C., 368.

§ 244. *Compensation for buildings.*—An assignment of all the right, title and interest of the lessee conveys his right to compensation for new erections on the land, covenanted by the lease to be paid for by the lessor. *Hunt v. Danforth*, 2 Curt., 592.

IV. LIEN.

§ 245. *Loss by fire; insurance money.*—The landlord's lien for rent upon the goods of his tenant does not, after their destruction by fire, attach to the insurance money obtained thereon by the tenant. *Booth v. Succession of Smith*,* 8 Woods, 18.

§ 246. *Under act of congress.*—Under the act of congress of February 22, 1867, the landlord's lien for rent attaches at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought upon the premises; and such lien takes priority to a deed of trust executed by the tenant after the commencement of the tenancy. *Beall v. White*, 4 Otto, 382 (§§ 37-39).

§ 247. Under the act of February 22, 1867, for the District of Columbia, the landlord's tacit lien for rent attaches to the personal property of the tenant brought upon the rented premises at the commencement of the tenancy, and continues for three months after the rent is due, and is not displaced by a sale, or a second sale, in mass, of such property, as long as the vendee, or the successive vendees, leave the same upon the leased premises. It can only be displaced by an actual sale in the ordinary course of trade by the tenant, accompanied by a removal of the things sold from the rented premises. *Fowler v. Rapley*,* 15 Wall., 828.

§ 248. In the District of Columbia the landlord's lien for rent attaches to any personalty of

the tenant as soon as the same is put upon the premises, and is good against a subsequent deed of trust, mortgage, or other lien, though not against a *bona fide* purchaser without notice of the lien. *Webb v. Sharp*,* 18 Wall., 14.

§ 249. Under the law of Louisiana and the decisions of the supreme court of that state a landlord has a right of pledge, for rent, upon the movable effects of the tenant, with privilege of seizure before, or within fifteen days after, their removal by the tenant, except where the goods are *in custodia legis*; when, although no seizure can be made, the privilege attaches to the proceeds in the possession of the sheriff, or in case of *cessio bonorum* in the hands of the syndic. Where the tenant, a corporation, owing rent, made a *cessio bonorum*, and the landlord, in consequence thereof, made no seizure within fifteen days after the removal of the goods; but the proceedings were afterwards adjudged void by reason of the want of capacity of a corporation to make a *cessio bonorum*, held, that the landlord did not lose his lien as against the other creditors by omitting to follow and seize the goods within fifteen days after their removal by the syndic. *Holdane v. Sumner*,* 15 Wall., 600.

§ 250. In South Carolina, under the state statutes and the statute of 8 Anne, ch. 14, which is in force in that state, a lien exists in favor of a landlord, on the personal property of his tenant, which is valid for one year as against all creditors; and the tenant's assignee in bankruptcy takes the property subject to the duty of executing this lien. *In re Trim*,* 2 Hughes, 355; 5 N. B. R., 23.

§ 251. In Illinois.—A landlord has no lien by distress under the law of Illinois until he has secured it by actual levy of a distress warrant. *Morgan v. Campbell*,* 22 Wall., 381.

§ 252. The statute of Illinois gives a specific lien to landlords on crops, but on no other species of property. *Morgan v. Campbell*,* 22 Wall., 381.

§ 253. An assignment in bankruptcy relates back to the filing of the petition, and avoids all intermediate liens, including the levy of a landlord's distress warrant, which is in the nature of mesne process. *Ibid*.

§ 254. In Virginia, a judgment being inferior to the homestead right, a landlord waives his right of priority by obtaining a judgment *for debt* on his claim for rent. *In re Lumpkin*, 2 Hughes, 175.

§ 255. The code of Alabama (Rev. Code, section 2878) only gives to the landlord priority over an execution creditor to the amount of one year's rent; it gives no lien. *Bailey v. Loeb*, 2 Woods, 578.

§ 256. Bankruptcy.—A clause in a lease by which the lessee gives to the lessor a lien upon the furniture, etc., upon the premises, to secure the rent reserved, is valid between the parties, and the lessee's assignee in bankruptcy takes subject thereto, unless such clause be in conflict with some statutory provision. *McLean v. Klein*, 3 Dill., 118. See DEBTOR AND CREDITOR.

§ 257. Although a landlord's right to distress for rent is not strictly a lien, it is a right in the nature of a lien, and is to be classed as a lien within the true intent and meaning of the bankrupt law. *Austin v. O'Reilly*, 2 Woods, 670.

§ 258. Miscellaneous.—A landlord who distrains horses, in Maryland, for rent, and hires them out and permits them to go into the District of Columbia, where they are attached for a debt due by the tenant, does not thereby lose his lien upon the horses for the rent, but may maintain replevin for them in the said District, notwithstanding the attachment. *Calvert v. Stewart*, 4 Cr. C. C., 728.

§ 259. Covenants in a lease, by the lessees, to erect buildings at a certain cost, and by the lessor to pay the lessees, at the end of the term, the value of the buildings at an appraisement, do not create a lien upon the premises for the value of the buildings, in favor of the lessees. *Confiscation Cases*, 1 Woods, 221.

LAND OFFICE.

See LAND.

LAND TITLES.

See CONVEYANCES; LAND. See, also, APPEALS, VI, 3, j; EVIDENCE, XVI.

LAND WARRANTS—LEAD MINES.

LAND WARRANTS.

See LAND.

LAPSE OF TIME.

See LIMITATIONS.

LARCENY.

See CRIMES, IX.

LAW AND EQUITY.

See EQUITY; PRACTICE.

LAW MERCHANT.

See BILLS AND NOTES; BONDS.

LAW OF NATIONS.

See CONSTITUTION AND LAWS; TREATIES; WAR.

LAW OF THE FORUM.

See COURTS.

LAW OF THE PLACE.

See CONTRACTS; INTEREST.

LAWS.

See CONSTITUTION AND LAWS.

LAWYERS.

See ATTORNEYS.

LEAD MINES.

See MINES.

LEASE—LETTER OF RECOMMENDATION.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See ESTATES OF DECEDENTS.

LEGAL QUESTIONS.

See PRACTICE.

LEGAL REPRESENTATIVES.

See CONTRACTS; ESTATES OF DECEDENTS.

LEGAL TENDER.

See MONEY; PAYMENT.

LEGATEES.

See ESTATES OF DECEDENTS.

LEGISLATURES.

See STATES.

LEGITIMACY.

See DOMESTIC RELATIONS.

LETTER OF ATTORNEY.

See AGENCY.

LETTER OF CREDIT.

See CONTRACTS.

LETTER OF RECOMMENDATION.

See FRAUD.

LETTERS.

See CONTRACTS; EVIDENCE.

LETTERS PATENT.

See PATENTS.

LETTERS TESTAMENTARY.

See ESTATES OF DECEDENTS.

LEX FORI.

See COURTS.

LEX LOCI.

See CONTRACTS; INTEREST.

LIBEL.

See TORTS.

LIBEL IN ADMIRALTY.

See PLEADING.

LICENSES.

§ 1. **Revocable — Death of licensee.**— A license to enter lands, not coupled with an interest, is a personal privilege, and conveys no estate or interest, and is revocable at the pleasure of the party giving it. It ceases with the death of either party, and cannot be transferred or alienated by the licensee. The Mexican governor of the province of California *granted* provisionally to certain parties the *occupation* of a certain portion of the common lands, subject to the mensuration to be made of such common lands. The document by which the grant was made contained a provision against alienation, as well as other prohibitions, and a provision for forfeiture in case of condition broken. After the death of the grantees, their heirs granted the lands to other parties, who presented their claim for confirmation. *Held*, that the right conferred by the document was a mere license to occupy the premises until the common lands should be measured; but that being a license and not a grant, it terminated upon the death of the licensees in accordance with the above principles. *De Haro v. United States*, 5 Wall., 599.

§ 2. A license is an authority to do a particular act or series of acts upon the land of another without possessing an estate therein. When executed, it will prevent the owner of the land from maintaining an action for the acts done under it; but it is revocable at pleasure, and will not be a defense for an act done after revocation. A consideration may have been given for it, or expenditures made strictly on the faith of it, yet the owner of the land may re-

voke it when he will (unless it be coupled with an interest) without paying back the money, or making compensation for the expenditure. *Morgan v. United States*,* 14 Ct. Cl., 819.

§ 3. **Irrevocable.**—Where by legislative enactment a lottery company is incorporated for twenty-five years, at the end of which period it is to be dissolved and liquidated, such company being required to collect a large amount of capital within a limited time, and to make and secure quarterly payments to the state auditor for all that time, *held*, that the faculties and privileges of such company are vested for a term of twenty-five years and the license is irrevocable. *Louisiana State Lottery Co. v. Fitzpatrick*, 8 Woods, 222.

§ 4. A license to use property for specific purposes, not specially restricted, and coupled with an interest which is necessary to the enjoyment of the rights granted by such license, is not revocable by the grantor while the interest exists. The fee in such case remains in the original owner, but the right of the licensee to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. Thus where the secretary of war, by authority derived from an act of congress, granted permission to a railroad company to run its road through, and over, lands belonging to the United States at Harper's Ferry, the written license containing an agreement to the effect that "the said company shall allow the United States to construct and keep up forever a depot, with suitable tracks, switches and turnabouts, to be connected with said road," and the company built and constructed its railroad under this authority, *held*, that the license was irrevocable, and that the doctrine of equitable estoppel applied. *United States v. Baltimore & Ohio R. Co.*, 1 Hughes, 138.

§ 5. **Removal of buildings from rented premises.**—A lot was leased to the United States, the term to "continue from month to month during the pleasure of the United States." A few days before the termination of a current month the government gave notice that the property would be vacated at the end of the month, the rent to cease from that date, reserving the right to sell or otherwise dispose of the buildings erected on the premises (seventeen in number). Most of the buildings remained upon the premises for eight months after this notice, and watchmen were left to look after them. No claim for rent or demand for possession was made by the lessors until about five months after the notice. *Held*, that the said notice, followed by the silence of the lessors, did not constitute a license to the United States to leave their buildings upon the premises after vacating them, and to remove them after the termination of the lease. *Morgan v. United States*,* 14 Ct. Cl., 819.

§ 6. **To use water — Revocation.**—The proviso in the Pennsylvania and New Jersey act of 1771, section 7, by which those states, in declaring the Delaware river a common highway, and authorizing the improvement of it by commissioners, provided that no power given by the act should give power "to remove, throw down, lower or impair, or in any manner to alter," certain mill-dams, nor to obstruct or "in any manner hinder" the owners of them, or their "heirs and assigns," from taking water out of the said river for the use of the said mills, is not a *grant* of the water, but the toleration of a nuisance, and a mere *license*, revocable at pleasure, to use the water. *Rundle v. Delaware & Raritan Canal*, 1 Wall. Jr., 275.

§ 7. The Pennsylvania and New Jersey act of 1771 declared the Delaware river a common highway, and authorized commissioners to improve the river, but restricted them from interfering with the dams of mill owners, or hindering such mill owners from taking water out of said river for the use of their mills. Subsequently the legislature of the state of Pennsylvania granted a license to a canal company to divert a portion of the water of said river into its canal. In an action by a mill owner against the canal company, *held*, that, by the laws of Pennsylvania, the Delaware river is a public navigable river, held by its joint sovereigns in trust for the public; that riparian owners of land have no title to the river or any right to divert its waters, unless by license from the state; that such license is revocable, and in subjection to the superior right of the state to divert the water for public improvements. *Rundle v. Delaware & Raritan Canal Co.*, 14 How., 80.

§ 8. A license, in writing, to dig a canal through the grantor's land does not convey to the grantee, as an incident, the proprietary interest in the soil dug up in constructing the canal. *Lyman v. Arnold*, 5 Mason, 195.

§ 9. **Tenancy at will.**—A permission to occupy and enjoy premises for an indefinite period free from rent is properly a tenancy at will, and not a license. *Morgan v. United States*,* 14 Ct. Cl., 819.

§ 10. **Limiting right to use of machine.**—A license to run a planing machine contained a restriction that the licensee should not dress plank or other material for other persons, to be carried out of a specified territory and resold as an article of merchandise. The restriction was both a covenant by the licensee and a condition of the grant. *Held*, that under no circumstances could the planed article, with the privity or consent of the licensee, be sold out of the territory as an article of merchandise, or, with his privity or consent, be sold within the territory to be carried out and resold as such article. A provisional injunction would be granted against such licensee, to restrain his use of the machine, if applied for during his violation of

such restriction; but such injunction was refused where it appeared that the licensee had violated the restriction under a misapprehension of his rights, and had discontinued the violation. *Wilson v. Sherman*, 1 Blatch., 586.

§ 11. A mere license to cross premises does not create any obligation to guard against injury or accident to the licensee. Thus where M., while crossing defendant's tracks at a dangerous place, instead of at a place provided by the defendant, fell into an unprotected pit and was injured, *held*, that as there was at most a naked license to cross there, the defendant was not liable. *Morgan v. Pennsylvania R. Co.*, 7 Fed. R., 78; 11 Rep., 767; 19 Blatch., 259.

§ 12. Right of way.—Where the owner of two adjoining houses sold one of them, and afterwards gave the purchaser a license to use an alley way between the two houses, upon a subsequent conveyance by the purchaser of the house sold, such license does not pass to his grantee. *McPherson v. Acker*,* 21 Alb. L. J., 52.

§ 13. To cut timber—Reserving title.—A conditional license to cut timber contained the following: "Said grantor reserves full control and ownership of all logs and lumber which shall be cut under this permit, wherever and however situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and the sum or sums due, or to become due, for stumpage or otherwise shall be fully paid." *Held*, that a purchaser of logs cut under the license, although *bona fide*, could only acquire the title possessed by the grantee under the license. *Homans v. Newton*, 4 Fed. R., 880.

§ 14. It was further provided in the license, that, in case of default by the licensee, the grantor should have full power to sell all or any of the logs cut, and after deducting the amount then due, expenses and commissions, pay the balance to the licensee. *Held*, that in trover the grantor could only recover of a *bona fide* purchaser the amount his due, and not the whole value of the logs. *Ibid*.

§ 15. To dig ore.—Where one owning a large tract of land grants, bargains and sells part of it, and for himself, his heirs, executors and administrators, covenants with the grantee, his heirs and assigns, that he and they may dig, take and carry away all iron ore to be found within the ungranted part of the tract, paying so much per ton, *held*, 1st, that this is not a grant of the ore, but a license to dig and carry away ore to be found; 2d, that no property accrues in the ore until the privilege has been exercised; 3d, that the license is without stint, but is not exclusive of the owner of the soil; 4th, that the right acquired under it is indivisible, and an assignee, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil. *Grubb v. Bayard*, 2 Wall. Jr., 81.

LICENSE TAX.

See REVENUE.

LIENS.

[Of Factors, see AGENCY, XV, 3. Of Attorneys, see ATTORNEYS, IV. Of Banks, see BANKS, VII. As to Railroad Mortgages, see CONVEYANCES, C, XIV. In Bankruptcy, see DEBTOR AND CREDITOR, XIII. Judgment Liens, see JUDGMENTS, V. Of Landlords, see LANDLORD AND TENANT, IV. Maritime Liens, see MARITIME LAW. For Taxes, etc., see REVENUE. Vendor's Lien, see LAND.]

I. IN GENERAL, §§ 1-86.

II. MECHANICS' LIENS, §§ 87-194.

III. IN EQUITY, §§ 195-210.

IV. ON RAILROADS, §§ 211-233.

I. IN GENERAL.

SUMMARY — *Contract among property owners to improve their property, § 1.—Possession of thing on which lien is claimed must be just, § 2.*

§ 1. In a suit in equity, it appeared that on the 15th day of April, 1837, articles of agreement, under seal, were entered into by certain mill-owners, who had associated themselves together for the purpose of creating reservoirs of water, etc., to render the stream by which their mills were driven more constant and full, by which they agreed that there should be a lien on their respective estates to pay their proportions of all debts incurred in creating and managing this water-power. It was declared that the articles created a lien on the real estate

of the respective parties, enforceable by one member of the association; that a purchaser of one of the mills, with notice of the lien, took the title charged with the lien, and that said lien was an equitable mortgage, barred only by the time required to bar a legal mortgage. *Clarke v. Southwick*, §§ 2-5.

§ 2. To create a lien on a chattel the possession must be just. No lien can be acquired by an illegal or fraudulent act, or breach of duty, nor where it is inconsistent with the express terms or clear intent of the contract. *Randel v. Brown*, §§ 6, 7.

[NOTES.— See §§ 8-86.]

CLARKE v. SOUTHWICK.

(Circuit Court for Massachusetts: 1 Curtis, 297-305. 1852.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.— This is a bill in equity to establish and enforce a lien on certain mills, lands and their appurtenances, belonging to the defendant. The facts upon which the lien is asserted are, that on the 15th day of April, 1837, articles of agreement, under seal, were entered into by certain persons who owned mills upon a stream of water in the town of Sutton, in the county of Worcester, the object of which was to associate themselves, under the name of the Sutton Water Power Company, for the purpose of creating reservoirs of water, to render the stream by which their mills were driven more constant and full for their common benefit; that the proprietors of six different mills were parties to this agreement; that they thereby agreed, among other things, that there should be a lien on their respective estates to secure the faithful performance by each to the other of the covenants contained in the articles. Among these covenants was one that the associates would pay all debts incurred in creating and managing this water-power, in the proportions specified, one-sixth part thereof being chargeable to each of the six mills.

The complainant was a member of this association, as one out of three owners of one of the mills; and two days after the execution of the articles, he became, by purchase from his co-tenants, sole owner thereof. The articles contained a provision that, if either of the mills should be sold, the purchaser might become a member of the association.

Three of the mills were conveyed, after the execution of the articles, to the Sutton Woolen Mills, a manufacturing corporation, which became a member of the association; and, while thus a member, and through its action as such, large expenses were incurred in the purchase of lands, the erection of a dam, and liabilities for land damages, from a flowage, which, though in part paid by the association through regular contributions for that purpose, was mostly left unpaid; and the complainant, as one of the members of the association, has been obliged to pay the residue; and he now seeks, by this bill, to charge upon three of the mills, formerly owned by the Sutton Woolen Mills, but now owned by the respondent, three-sixths of what he has thus paid, being the proportions stipulated by the original agreement to be borne by the owners of those mills.

§ 3. *Where the owner of real property agrees in writing, and for a consideration, that a lien shall exist upon his property for the enforcement of a debt or duty, such lien does exist and will be enforced by a court of equity.*

The first question made at the bar is, whether the articles created a lien on the real estate. Of this I have no doubt. The parties covenant, each with the other, for the payment of all debts incurred in the execution of their common object; and then go on to bind, not only themselves, but "his and their

respective estates hereinafter mentioned," to the faithful performance of all the provisions of the instrument; and after describing each estate, and the contributory share to be borne by it, they use this language: "meaning and intending hereby to create a lien upon, and to bind our said estates, so far as we may, either in law or equity, do the same," etc.

Whenever the owner of real property agrees, in writing, for a valuable consideration, that a lien for a debt or duty shall exist on that property, in the view of a court of equity, it does exist. Such an agreement is not executory merely, but so far as respects the parties, and those claiming under them as volunteers, or with notice, it is executed; it creates a trust, which this court will enforce, and, by means of it, work out, according to its own modes of proceeding, the payment of the debt, or the performance of the duty, which the parties have manifested their intention to have thus secured. The authorities in support of this position are numerous.

I will refer to some in which the principles upon which this position rests are most clearly stated. In *Legard v. Hodges*, 1 Ves. Jr., 477, Lord Loughborough said: "I take the maxim to be universal, that wherever persons agree concerning any particular subject, in a court of equity, as against the party himself, or any claiming under him voluntarily, or with notice, a trust is raised." In *Collyer v. Fallon*, 1 Turn. & Russ., 469, the principle is laid down — "Contract, with respect to a given matter, binds the property, as between the parties to the contract, and all claiming under them, with notice." And in the recent case of *Malcolm v. Scott*, 3 Hare, 39, 46, 52, it is taken to be clear, that, when you make out an agreement to give a lien, the lien exists. Upon this principle, *Burn v. Carvalho*, 4 M. & Cr., 702; *Hankey v. Vernon*, 2 Cox, 12; *Clarke v. Mauran*, 3 Paige, 373; *Parker v. Muggridge*, 2 Story, 334, and many cases in bankruptcy, from 1 G. & J., 13, to 2 M. & A., 224, have been decided.

My opinion is, that the articles of agreement now in question, which in express terms declared that there was to be a lien on these estates, created an equitable lien, capable of being enforced through the power of this court.

The next question is, whether this lien is capable of being enforced at the instance of the plaintiff. It is argued that only the association or company has this lien. This depends on the intent of the parties, manifested in the instrument; and I do not so construe it. The lien accompanies the covenant, and is intended to secure its performance. The covenant that each will pay his proportion of the debts is a several covenant by each with each member. Its language is, "and the members of the said company, each for himself respectively, etc., does covenant, promise and agree, each with the other, etc., for the due and faithful execution," etc. Whatever several rights the plaintiff has are, therefore, intended to be secured, and in a court of equity are secured by the lien, which is co-extensive with the obligation of the covenant, and binds the lands, as that obligation bound the parties to it.

It has been argued that the members were not liable *inter sese* until after an assessment made; but there is nothing in the instrument on which to rest this position. The covenant by each to discharge and pay his stipulated proportion of all debts is absolute and unqualified. The words "assessed" and "assessment" do occur in the instrument, but only as synonymous with share or proportion; and there is nowhere any provision calling for any formal act of assessment as a condition precedent to the right of each member to have every other member pay his stipulated part of the expenses of the association.

§ 4. — *liability of one purchasing land and sharing in benefits.*

It is true these debts were contracted while the Sutton Woolen Mills owned the three estates in question; and that corporation was not originally a member of the association, and did not execute the articles. But the articles contained a provision that any purchaser of either of these mills might become a member of the association, and the bill avers that this corporation did become a member. This averment of the bill is admitted to be true. Indeed, the very debts which the plaintiff has paid were contracted by that corporation as a member of the association. I am inclined to think that a purchaser of one of these mills, though he took his estate incumbered by the lien to secure the performance of this covenant, might exempt it from the charge for future debts by refusing to become a member of the association; but if he became a member, and actually participated in creating debts, I think the lien extended to his share of them. When he takes the title, it is charged with a lien to secure the payment of the just contributory share of expenses which have been or shall be incurred for the common benefit of that and five other estates. So far as expenses have then been incurred, they are clearly a charge on the land. Independent of any stipulation in the articles giving the purchaser a right to withdraw, and refuse to participate in future expenditures, it would be difficult to show that the estate would not be bound for them, even if he did not expressly consent to what was done. There are cases in which, without any actual contract, equity will compel the owner of property to contribute to the cost of a work erected by another for their common benefit, as in case of a party wall. *Campbell v. Mesier*, 4 Johns. Ch., 334.

This principle has never been extended to works designed to improve the flow of a stream, for the advantage of all the mills upon it, and there are sufficient reasons why it should not be so applied; but I know of no reason why the owners should not make a contract, not only to build, but preserve and manage, reservoirs and other works for the common benefit of their respective mills, and charge the expenses thereof, permanently, on their respective estates, so that any purchaser would take his title *cum onere*, and be liable to pay the share belonging to his mill, even if he expressly dissented from the expenditure. As already intimated, I do not consider these articles were intended to bind the estate of any purchaser for expenses incurred after the purchase, against his will; but I see no difficulty in holding that the lien, which existed on these three mills when the original members of the association sold them, secured not only the payment of what there had been, but of what thereafter should be, expended, with the assent of the purchaser.

It is true that a purchaser for a valuable consideration, and without notice, would take the estate discharged of the lien; but the bill avers notice to all the purchasers, including the defendant, and this averment is admitted to be true. My opinion is that the Sutton Woolen Mills took these estates charged with a lien for three-sixths of the expenditures which had then been made pursuant to the articles, or which should thereafter be made with its assent; and that this lien was capable of being enforced by any member of the association.

It is urged, however, that this bill is defective, because the plaintiff has not joined the other members of the association. But they have no interest in this suit, the object of which is to charge on the defendant's estates their contributory share. I am aware that formerly the rule was, that, in a bill for contribution, all those liable to contribute must be joined, upon the hypothesis

that each might assist the others in the taking of the account; but this rule has been found so inconvenient, and so little beneficial in practice, that, by an order made in 1841, it has been abrogated in England (1 Dan. Ch. Pr., 331). and under the fifty-third rule for the practice of this court, I can have no doubt that it is my duty to make a decree in the absence of those parties, as their joinder would defeat the jurisdiction, and a decree can be made without affecting their interests.

If there was any property of this association capable of being applied, and which, equitably, ought to be applied in payment of its debts, before resorting to the lien asserted by the bill, all the members would be necessary parties, because they would then have an interest both in the account of the debts and of the property, and in its application. But there is no such property. The works which the association has erected for the improvement of these mills cannot be sold without defeating the very object for which the association was formed. Every member has a right to have them preserved, and to have every other member pay his contributory share, in order that they may be preserved. So far from these works constituting a fund to be resorted to in relief of the contributors, they are the very object of the contribution, and equity requires it to be made, in order that the original purposes of the parties may be fulfilled.

It is objected that the defendant may hereafter, by other suits, have other debts of the association charged on his estates, so that he is exposed to pay more than his just share, and thus be forced to seek for contribution himself, in another suit. If this were so, it would be a fatal objection; but the defendant, not being a member of the association, and so not being personally liable, can never be forced to pay any more than three-sixths of any debt, and so can never have any claim for contribution; for this proportion is what is justly and ultimately chargeable on his estates. These are all the objections growing out of the supposed defect of parties, which have been assigned at the bar, and, in my opinion, they are not tenable.

§ 5. — *such liens not barred by lapse of time insufficient to raise a presumption that they have been paid; doctrine of equity as to the time necessary to bar a lien.*

The defendant insists that this is a stale claim; that the plaintiff has been guilty of such laches that this court will not lend its aid to enforce the lien. He relies on the doctrines of courts of admiralty respecting maritime liens, and several decisions on that subject were cited. But there is no occasion to resort to analogies drawn from another branch of jurisprudence, because equity has its own settled rules and principles which govern the case. First of all, equity protects *bona fide* purchasers without notice. Against such a purchaser it does not enforce such a lien. This leaves for consideration only the rights of the party creating the lien, and those who succeed to those rights. As against them, an equitable mortgage is like a technical legal mortgage. If there be a statute of limitations, barring the rights of a legal mortgagee after the lapse of a certain time, equity will follow the law, and hold the same time a bar to a bill to foreclose an equitable mortgage. But it will not distinguish between an equitable and a legal mortgage in this particular. *Hughes v. Edwards*, 9 Wheat., 494 (Conv., §§ 919-25); *Lingan v. Henderson*, 1 Bland, 282; *Moreton v. Harrison*, 1 Bland, 491; *Shiratz v. Nicodemus*, 7 Yerger, 9. The fact that the action at law for the debt is barred by the statute is not material in equity, as it is not at law. *Thayer v. Mann*, 19 Pick., 535; *Baldwin v. Norton*, 2 Conn.,

163. Keeping these principles in view, it is plain that the court cannot refuse relief in this case, either by reason of the statute of limitations, or upon the ground of laches. By the law of Massachusetts, twenty years' adverse possession bars an action at law to foreclose a mortgage. Less than twenty years is not sufficient to afford a positive bar to a bill to foreclose an equitable mortgage on land in that state. Neither is this a case in which laches can be imputed to the plaintiff. He paid these moneys from time to time, between 1839 and 1843, and in 1843 he brought a suit in the state court to enforce this lien. The suit failed, for want of a sufficient equity jurisdiction, in October, 1847, and in April, 1848, this bill was filed. Whatever might be said of this, if the plaintiff were seeking to call into action the discretionary authority which this court exercises to give relief concurrently with courts of law, as in bills for the specific performance or rescission of contracts, there can be no pretense for saying that this lapse of time has affected the right of a creditor to obtain payment of his debt through an equitable mortgage on land. Nothing short of such time and circumstances as raise a presumption of payment can avail the debtor or discharge the land.

A decree is to be entered, referring the cause to a master to state an account, with directions to ascertain what debts of the association have been paid by the plaintiff, in full, and what in part only, if any, and also what debts of the association have been paid in full by the owners of the three estates held by the defendant, and what in part only, and let the report show when all such debts were contracted and paid.

LANDEL v. BROWN.

(2 Howard, 406-425. 1844.)

APPEALS from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE MCKINLEY.

STATEMENT OF FACTS.—Randel filed his bill against Brown, on the chancery side of the circuit court of the United States for the eastern district of Pennsylvania, in which he states that, wishing to negotiate a loan of \$10,000, to be secured on certificates of the funded debt of the Chesapeake and Delaware Canal Company, he applied to Brown to aid him in the negotiation with one of the banks of Philadelphia. And that it was agreed between them, that Randel should deliver to Brown two certificates of the funded debt of the canal company, for \$5,000 each, and execute to him a power of attorney, authorizing him to transfer the certificates to himself, or to any other person; and that Brown should, upon his own note, and the pledge of the certificates, if practicable, obtain a loan for Randel.

And in pursuance of this agreement, he executed the power, and delivered it and the certificates to Brown. That instead of obtaining a loan of money as he had promised, Brown transferred the certificates to himself, and delivered them up to the canal company, and obtained new ones in his own name. That when Randel applied to Brown to know whether he had obtained the loan of \$10,000 for him, Brown replied that he had bad news for him: "I have not succeeded at the bank;" that the bank had a disposition to lend, but had not the means. That Randel then requested him to return the certificates of debt, which Brown refused to do; saying he intended "to hold on to them" till Randel settled with him, or made him the present he had promised him.

Randel then put the following interrogatories to Brown: "Whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid; and whether he had any interest in the same, and was not, in holding the same, a mere trustee for the complainant, and did not refuse to deliver them to him; and whether he did not transfer said certificates to himself, on Monday, the 24th of October; and what circumstances occurred before the board of directors, or were communicated to him; and whether he did not inform the complainant that he had not succeeded at the bank, and give the complainant to believe that he had made application on that or the preceding day; and whether the certificates were not transferred, by said Brown, to his own use and not for the use of the complainant; and what use or disposition, if any, he had made thereof, and to whom, and for what consideration."

The answer denies all the material allegations of the bill, except it admits the receipt of the power of attorney and the certificates of debt. Brown then sets up, in his answer, a claim for services rendered to Randel, from the early part of the year 1831, till the 24th day of October, 1836, of various kinds, but particularly in attending to, and preparing for trial, a suit brought by Randel against the said canal company. And he alleges that Randel agreed to give him a reasonable compensation for time to be expended in his service, in any event, and to pay his traveling and other expenses; and in the event of success in the suit, the additional compensation of two and a half per cent. on the amount that might be received thereon; and that Randel finally recovered judgment, and received from the company the sum of \$230,000 in payment thereof.

But before the payment, and while it was uncertain whether anything would be realized from the judgment, Brown states that, from exposure in the service of Randel, he was taken sick, and it being uncertain whether he would recover or not, he applied to Randel for payment for the time then expended in his service, whereupon Randel caused be to transferred to the use of Brown \$2,000, part of said judgment. And a short time thereafter, about the month of September, 1834, Randel requested him to accept an order, drawn on him by Randel in favor of a certain William H. Camac, for \$2,000, promising, at the same time, to place funds in his hands to meet its payment, which induced him to accept it. Brown refers to the order in his answer, and which is as follows:

"Sir: Out of the sum of \$2,000 with interest due, and to become due thereon, which was assigned, at my request, by Samuel H. Hodson, to you, being one-fifth part of the sum assigned by me to him, on trust, the 27th of January last, out of the judgment obtained by me against the Chesapeake and Delaware Canal Company, please to pay to William H. Camac, or order, the sum of \$2,000, out of the first moneys you obtain from said company on said account, or on account of tolls attached. If more than one year elapse before you obtain the whole of said sum of \$2,000, then pay to said Camac an interest of six per cent. on whatever balance may remain unpaid, after the expiration of said term of one year." Brown accepted this order on the 26th of September, 1834.

It is further charged in the answer, that on the 18th day of April, 1836, for time expended in his service, from the date of the assignment of the said sum of \$2,000, down to that time, Randel gave to Brown a promissory note for \$300, payable ninety days after date. He then charges that the two certifi-

cates of debt were delivered to him by Randel, on the 20th of October, 1836, for the purpose of paying himself, and the debt of \$2,000 to Camac. And at the same time Randel requested him to go to New Castle and re-assign the part of said judgment which had been assigned to him as aforesaid; and that he, Randel, would then execute the power to Brown to enable him to transfer said two certificates of debt to himself. And accordingly, on the 22d of the same month, he, at New Castle, re-assigned to Randel said sum of \$2,000, part of said judgment, and received from him the power of attorney, authorizing him to transfer said two certificates of debt, numbered 34 and 35, to himself or any other person.

And in answer to the interrogatories in the bill, Brown says: "That he did not receive said certificates and power of attorney, in trust and confidence, in the manner and under the circumstances therein set forth, but absolutely, as an unqualified transfer, in payment of a debt due to him by the complainant, and distinctly admitted by him, and to enable him, the respondent, to pay William H. Camac the amount of his, the respondent's, acceptance, as before stated; and that said respondent has an absolute and unqualified interest in the certificates, to the whole amount of their principal and interest, and that he does not hold them as trustee for the complainant, nor any other person, but in his own right and for his own use.

"And that he did refuse to deliver said certificates to the complainant, and did actually transfer said certificates to himself on Monday, the 24th day of October last; and that he did not place said certificates before the directors of the Schuylkill Bank on Monday, the 24th, or Tuesday, the 25th of October last. That touching the disposition your respondent has made of the said certificates, he says that they still stand in the name of your respondent, and were surrendered to this honorable court on the presentation of the complainant's bill of complaint." To the answer, the complainant filed a general replication. And, after time had been allowed the parties to take depositions, the court referred the case to three masters, with special instructions.

The masters, after a very thorough examination of the evidence in the cause, reported against the claim of Brown for separate compensation for time; but allowed him the two and a half per cent. commissions claimed in his answer, amounting to \$5,659.64, as compensation for all services rendered. Both parties excepted to the report. Brown, to that part of it which disallowed his claim for separate compensation for time; and Randel excepted to that part which allowed to Brown two and a half per cent. on the amount of the judgment against the canal company.

The court overruled these and all other exceptions, confirmed the report of the masters, and rendered a decree in favor of Brown for the amount allowed by the masters, with interest from the 5th day of May, 1840, amounting together to the sum of \$6,136, to be paid out of these two certificates. From this decree both parties have appealed to this court.

The right of Brown to compensation for time, and his right to commissions on the amount of the judgment, are both involved in his assertion of the more general right, to be compensated, for all his services, out of these certificates. The principal questions, therefore, which we deem it necessary to examine, are, 1. Were the certificates delivered to Brown in payment of a debt to himself, and to pay the debt to Camac? And, if they were not so delivered, then, 2. Had Brown such a legal or equitable interest in the certificates as authorized the decree of the court below? A just solution of these ques-

tions depends upon a proper examination of the evidence applicable to them, and the particular circumstances under which the witnesses acquired a knowledge of the facts they have deposed to.

§ 6. The evidence in the case considered, and masters' report reviewed.

Shortly after the bill was filed, and before Brown had filed his answer, he went to Delaware to ascertain what evidence he could obtain from persons having a knowledge of the services he had rendered to Randel. And from the inquiries he made of several of the witnesses, and the disclosures made to them of the nature of his controversy with Randel, it is reasonable to suppose that he intended, at that time, to rest his defense upon the amount and value of his services only, and that he had not then thought of claiming the certificates, as having been delivered to him in payment of a debt due for those services. The depositions of four of those persons are found in the record. T. B. Roberts states, in his deposition, that Brown asked him what evidence he could give, as to the value of his services while with Randel, stating that the witness was aware of his having been for years doing business for him.

The witness then says that Brown stated to him "that the certificates had been put into his hands by Mr. Randel, to raise money upon them to pay certain debts of Randel's in Philadelphia; one of which he mentioned was to Mr. Camac; I think he stated himself under some obligation to have paid by Mr. Randel; and another debt to Mr. Charles Ingersoll; he did not state that the balance was for himself. He said he had exerted himself to negotiate the certificates to several persons, but had not succeeded;" "that Mr. Randel wished him to return the certificates to him, but he had refused to do so, until Mr. Randel settled certain debts he owed."

A. C. Gray, to whom Brown applied, for the purpose of getting his services as commissioner to take depositions for him in this suit, says Brown stated "that he had received a transfer of \$10,000 from Randel of the canal's debt, for the purpose of raising money; with which Mr. Randel wished to pay his debts. He stated also, that Mr. Randel owed him money for services which he had rendered him during the long litigation which had taken place between Randel and the canal company. In consequence of these things, he had determined to hold on to these certificates, as the only means to enforce the settlement of his claims."

Thomas Janvier, another of these witnesses, states that when Brown applied to him to ascertain what testimony he could give in this case, Brown stated that Randel had promised to pay him two and a half per cent. on the judgment against the canal company. The witness replied that his testimony might operate against him, as the only claim he had ever heard him assert was, that he intended to make Randel pay him \$2,000 for his services. Janvier then says: "That in the course of the conversation he gave me a history of the transaction upon which this suit is founded; and told me that Randel had given him these certificates, which are now in controversy, for the purpose of negotiating a loan to pay certain debts he had contracted — debts due to Mr. Camac, Mr. Charles Ingersoll, and himself; so far, I recollect positively. I am certain, from the information of Mr. Brown, that the certificates were given for the purpose of negotiating a loan, to enable Randel to pay certain creditors. I am certain he named Mr. Camac, Mr. C. Ingersoll, and himself as creditors."

Cornelius D. Blaney, the fourth witness, says he does not recollect that Brown stated how the certificates came into his hands; in other respects his

testimony is, substantially, the same as that of the other three witnesses; and it appears that he was present at the conversation between Brown and the witness Roberts.

After collating this evidence with clearness and ability, the masters proceed to say: "It is remarkable that to none of these persons did the respondent state the fact that he had transferred these certificates into his own name; it is remarkable also, that if, at that time, he did entertain the same clear and positive conceptions of his rights which is set forth in the answer, he did not simply and plainly state that right, and say, "they (the certificates) were given in payment, or part, payment, of my own claim, and of my liability to Mr. Camac." We cannot close our minds to the force of the testimony of these four persons. It has been ably urged that evidence gathered from the declarations of a party is unsafe, peculiarly liable to the effects of misapprehension, of inattention, of defect, of recollection; that a word omitted, or displaced, may change the whole character of the declaration. We have felt the force of the argument, but it does not prevail against the influence of the concurring testimony of four intelligent and respectable men, giving a very uniform account of the respondent's representation of his own case; and, in relation to the question of trust, giving such a narration as to lead to one and the same result. We have observed, too, that it is the same species of evidence upon which the respondent asserts his alleged contract with the complainant, which contract he states in his answer, in the words or declarations of the complainant, alleged to have been uttered to himself, at a time much less recent than his own declarations to the witnesses."

"The testimony of these witnesses, then, establishes, in our opinion, and accordingly we find, and so report: 1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust. 2. That the trust was to raise money. 3. That of the money so to be raised, part was to be paid to Mr. Camac; and that, as to this part, the respondent had a direct interest in the execution of the trust in consequence of his acceptance of the draft drawn in favor of Mr. Camac referred to in the answer, and of his retransfer of the interest in the judgment upon which the draft was drawn. 4. That another portion of the money so to be raised was to be paid to Mr. C. Ingersoll. 5. That no express appropriation of the balance, or any part thereof, was made at the time by the complainant in favor of the respondent."

We concur entirely with the masters in their reasoning, and in the conclusions they have arrived at, upon this testimony, except as to the supposed interest of Brown in the execution of the trust mentioned in the third specification. Upon that we shall have occasion to comment in another part of this opinion. This evidence sustains the allegations of the bill fully, and contradicts the answer as to the objects and purposes for which the two certificates were delivered by Randel to Brown. There is, therefore, no further pretense to say that Brown received the certificates in payment of a debt to himself, and for the purpose of paying the debt to Camac. And this evidence establishes another material fact in this case; and that is, that Brown had no interest or property in the certificates before they were delivered to him by Randel; and whether he acquired any in them afterwards, leads us to the consideration of the second question. Had Brown such an equitable interest in the certificates as authorized the decree of the court below?

In the third specification before referred to, the masters reported that Brown had a direct interest in the certificates on account of his acceptance of Randel's

order in favor of Camac, and his having relinquished to Randel his interest in the judgment. It is difficult to ascertain upon what ground it was assumed at the date of the report that Brown had an interest in these certificates. The order was drawn upon a special and contingent fund, which might never be received; and until received, Brown was not liable to pay. There is no proof in the cause that can be relied upon to show on what consideration the re-assignment was made, unless the statements in Brown's answer are to be received as evidence. When the answers of the defendant are directly responsive to the allegations of the bill, they amount to positive proof. But in this case there is no allegation in the bill in relation to this assignment or re-assignment. Brown, in giving a history of the transactions between him and Randel, sets up in his answer this sum of \$2,000, as having been assigned to him in part payment of his services; and in another part of his answer he states that, upon receiving the certificates and power of attorney at the request of Randel, he re-assigned his interest in the judgment to him.

This being clearly matter in avoidance, it is entitled to no more consideration as evidence than are the allegations of the bill. There is no evidence, therefore, that the re-assignment was made in consideration of the delivery of the certificates by Randel to Brown. But there is strong presumptive evidence that it was made in consideration of the payment of the order to Camac by Randel, or of his promise to Brown that he would pay it; for it appears by the report of the masters that it was admitted by the parties and the counsel on both sides, that the amount of the order had been paid by Randel to Camac after the commencement of this suit.

But if Brown had even acquired a valid lien on the certificates on account of the acceptance of the order and the re-assignment of his interest in the judgment, the payment of the order by Randel, pending the suit, extinguished the lien, and no decree ought, on account of this supposed lien, to have been rendered in favor of Brown; for it is the rights of the parties at the time the decree is rendered that ought to govern the court in rendering the decree. In either aspect of the case, however, Brown's right to these certificates is reduced to naked possession; and, since his refusal to restore them to Randel, his possession has been fraudulent.

It has been contended by Brown's counsel that, as the masters have reported that a large amount was due from Randel to Brown, and that Randel had parted with all the rest of his certificates of funded debt, that, therefore, Brown had a right to payment out of the certificates in controversy in this case. In support of this proposition, they relied on the case of *Harding v. Handy*. 11 Wheat., 103 (Eq. §§ 779-89).

The bill in that case stated that Wheaton, under whom the complainants claimed as heirs at law, about the year 1802 began to exhibit symptoms indicating loss of intellect, and soon became incompetent to the management of his estate. Under these circumstances, it was agreed among his children that Handy, who had married his daughter, should endeavor to take his estate out of his hands, and preserve it for the benefit of his heirs at law. That it was agreed that Wheaton should be prevailed on to convey the real property to Handy, for a nominal consideration, who should forthwith execute an instrument of writing declaring that he took and held the same in trust — 1. To provide a decent support for the grantor during his life, and, after a full remuneration for his expenses and trouble in that respect, to hold the residue of the estate for the benefit of the heirs at law. Handy procured the convey

ance from Wheaton, and entered upon and possessed the property till his death, but refused to execute the declaration of trust.

The bill then prayed for an account; and that a decree might be rendered exonerating the estate from the deed to Handy, after satisfying his just claims etc. The answer denied that Wheaton was incapable of conveying when the deed was made. It denied also that the defendant purchased as a trustee; and averred that he was a purchaser for a full and valuable consideration.

The circuit court decreed that the deed should be set aside; and that an account should be taken of the receipts and disbursements of Handy, and that he should be credited for all advances made and charges incurred for the maintenance of Wheaton during his life, and for repairs and improvements made on the estate. This part of the decree was affirmed by the supreme court. Handy's possession of the estate was consistent with the intention of the parties; the advances made and charges incurred for the maintenance of Wheaton were according to their agreement; and the repairs and improvements made, preserved the estate and enhanced its value. Thus far Handy executed the trust fairly, and thereby acquired a lien on the funds in his hands arising from the rents and profits. Nor were these acts tainted by his subsequent fraud in refusing to execute other parts of the trust; and besides, the complainants, in their prayer for relief, authorized the court to allow Handy his just claims against the estate. This case does not, therefore, give any support to the proposition assumed by the counsel of Brown.

§ 7. *To create a lien on a chattel the possession must be just. No lien can be acquired by an illegal or fraudulent act or breach of duty, nor where it is inconsistent with the express terms or clear intent of the contract.*

There is no parallel between these cases, as a brief comparison will show. Brown's possession of the certificates, after refusing to restore them to Randel, was not only fraudulent, but wholly inconsistent with the contract with Randel, and in violation of the trust upon which he received them. And Randel, so far from authorizing the court to allow Brown's claim out of the certificates, stated positively in his bill that he owed him nothing. The proof shows conclusively that Brown had neither property nor interest in the certificates, before they were delivered to him by Randel. Unless he can show, therefore, that he has a lien on them, he can neither hold them as security for the payment of the claims set up in his answer, nor is he entitled to payment out of them, at law or in equity. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien, founded upon his own illegal or fraudulent act, or breach of duty; nor can a lien arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as to hold them or the proceeds for the owner, or a third person. Story on Agency, 73, 74, 75; Lamprier v. Pasley, 2 Terin R., 485; Cranston v. Philadelphia Ins. Co., 5 Bin., 538; Turno v. Bethune, 2 Desau., 285; Jarvis v. Rogers, 15 Mass., 389, 395; Weymouth v. Bowyer, 1 Ves. Jun., 416; Taylor v. Robinson, 8 Taunt., 648; Gray v. Wilson, 9 Watts, 512; Madden v. Kempster, 1 Camp., 12; Crockford v. Winter, 1 Camp., 124.

In the case of Madden v. Kempster, Lord Ellenborough said: "The defendant being under an acceptance for Captain Hart, whose agent he had been, might have retained a sum of money to answer that acceptance. But the

plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance; he obtained it as a balance when no balance was due to him. He cannot, therefore, set up the lien to which he might otherwise have been entitled." Lord Ellenborough held the same doctrine in the case of *Crockford v. Winter*; and the same doctrine was held in *Taylor v. Robinson*, 8 Taunt., 648.

In this case of *Madden v. Kempster*, it is admitted that Kempster would have had a good lien on the £60 if he had obtained the money honestly, and in the course of business. But having obtained it by misrepresentation, he was not permitted to set up the lien to which he might otherwise have been entitled. How then can Brown set up a lien on these certificates, holding possession of them as he does by just as gross a fraud? There is no aspect in which the question can be placed, consistently with the evidence and the authorities above cited, that will justify the decree in his favor. To permit this decree to stand would be to sanctify fraud, and to allow Brown, by taking advantage of his own wrong, to obtain compensation for his services in a court of chancery upon a case purely cognizable in a court of law. The decree of the circuit court is, therefore, reversed, and the cause is remanded to the circuit court with directions to enter a decree for the plaintiff, conformably to this opinion, and that the defendant pay costs in both courts.

§ 8. How created.—Liens may be created by statute or by express contract between the parties; or they may arise from usage, or be implied from the dealings or business relations between the parties, in which latter class of cases the lien is generally displaced by the surrender of the possession. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212.

§ 9. Liens depend upon contracts, express or implied, and none can be implied where the defendant acts adversely to the right of the person for whom he has paid the money on account of which he claims the lien. So held in case of conversion where defendant took, wrongfully, property belonging to plaintiff, and paid the storage on such property in order to get possession of it. *Allen v. Ogden*, 1 Wash., 174.

§ 10. Statutory liens on personal property have, without possession, the same operation and efficacy that existed in common law liens where possession accompanied the lien. *Beall v. White*, 4 Otto, 382.

§ 11. Possession is indispensable to the existence of a lien. By abandonment of the property over which the right extends, the vendor is deemed to surrender the security he has upon the goods, and to trust to the personal responsibility of the vendee. *In re Binford*, 3 Hughes, 295.

§ 12. To constitute a lien on property, real or personal, it is not indispensable that the property be in the possession of the person to whom the debt or duty is due. The word *lien*, in its common acceptation, is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty, although the property be not in the possession of him to whom the debt or duty is due. *Downer v. Brackett*,* 21 Vt., 602; 5 Law Rep., 392.

§ 13. A person who constructs cars, or other rolling stock, for a railroad, if he deliver the stock to the company, without any special provision to receive the payment, can claim no lien on the work. He may effect this lien while the work is in his possession, but if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien exists. *Coe v. Hart*,* 6 Am. L. Reg., 27.

§ 14. On a certain fund.—A promise, by a person borrowing money, to repay it out of a particular fund, due from another, when received, no notice being given to the person from whom the fund is due, does not constitute a lien upon such fund in favor of the lender. *Ex parte Tremont Nail Co.*,* 16 N. B. R., 448.

§ 15. It is indispensable to the validity of a lien upon a separate fund that there should be a distinct appropriation of the fund, and an agreement that the creditor shall be paid out of it. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212.

§ 16. Where a common fund is equally liable as security for various claims, it can only be administered for all; and this whether they have all matured or not. *Duncan v. Mobile & Ohio R. Co.*, 3 Woods, 567.

§ 17. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer, depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. A mortgage was executed to trustees, to secure holders of bonds that had been issued and sold to enable a railway company to complete and equip their road. The indenture contained a clause to the effect that the expenditure of all sums of money received from the sale of the bonds should be made with the approval of at least one of the trustees, and that his assent should be necessary to all contracts made by the corporation "before the same shall be a charge upon any of the sums thus received." *Held*, that such clause did not give a lien, but a mere claim, to parties to whom money became due from the company under contracts assented to by the trustees. *Dillon v. Barnard*, 21 Wall., 490.

§ 18. Factors and agents.—H. purchased a ship and cargo on account of himself and S. and D. It was agreed that S. should go as master and supercargo, the outward cargo to be consigned to S. H. made all the advances, both for ship and cargo, and was made agent and factor for the parties in New York, the return cargo to be consigned to him for sale on account of the concern. Shortly after the ship sailed H. drew on D. two bills of exchange, one for one-third the cost of the ship and the other for one-third the amount of the cargo. The latter was accepted by D. but never paid. D. becoming insolvent assigned his interest in the ship and cargo to G. for a pre-existing debt. *Held*, that H., being agent and factor for D., had a lien on the proceeds of the adventure for his advances in behalf of D., and that this lien was not waived by drawing the bill on D., especially as G. had due notice of H.'s claim at the time of the assignment to him; but that H. not being a general factor could only claim a lien for his advances on account of the outward cargo, and not for the balance of his general account against D. *De Wolf v. Howland*, 2 Paine, 356. See AGENCY.

§ 19. A factor has a lien on the proceeds of sales made by him, for his commission, and may retain for a general balance due from his principal. *McCobb v. Lindsay*, 2 Cr. C. C., 215.

§ 20. Where a person becomes an agent to purchase wheat or any other article, and a part of the money raised to pay for the wheat was obtained on his credit, he has a lien on the wheat, and may withhold the same until he is indemnified. *Matthews v. Menedger*, 2 McL., 145.

§ 21. A factor has a lien for all advances, on account of his principal, for balance due, or for liabilities incurred in the course of their business; but this lien is special, and is connected with the possession of the property, and if the property be voluntarily delivered up, or surrendered by the factor, the lien is extinguished, and cannot be re-asserted. *Ibid*.

§ 22. Where a factor makes advances or incurs liability on a consignment of goods, if there be no special agreement, he may sell the property, in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale, and the consignor has no right to interfere. The lien of the factor for advances and liabilities incurred extends not only to the property consigned, but, when sold, to the proceeds in the hands of the vendee, and the securities therefor in the hands of the factor. *Brander v. Phillips*, 16 Pet., 121.

§ 23. Consignees having made advances to the consignor have a paramount lien upon the goods for the advances, and where part of the goods were abstracted by the consignor while being shipped, and the remainder arrived in a damaged condition, the consignees may, by virtue of this lien, maintain an action against the common carrier, and recover damages to the extent of the advances made. *Burritt's Survivors v. Rench*, 4 McL., 825.

§ 24. An insurance broker who has paid the premium on a policy of insurance has a lien upon the policy for the amount so paid, and, although he has parted with it, upon coming to his hands again, to be put in suit, his lien for the premium would revive and be protected, unless the manner of his parting with it had manifested an intention in him to abandon such lien. Intermediate assignees in such case would take it subject to the charge. *Spring v. South Carolina Ins. Co.*, 8 Wheat., 268.

§ 25. But other liens on a policy of insurance, whether arising by agreement of the parties or by usage of law, stand on a different footing, and if the policy be assigned while out of the possession of the insurance broker, for a valuable consideration *bona fide*, on its returning to his possession such incumbrances, of which the assignee could have had no notice, nor no certain means of finding out, will not revive. *Ibid*.

§ 26. The commissions of a supercargo of a sequestered cargo are a charge upon the proceeds of sales, and are not included in the indemnity to be granted by the sequestering government. The indemnity stands in the place of the proceeds of sale, and the commissions are a charge upon that indemnity. *Stewart's Administratrix v. Callahan*, 4 Cr. C. C., 594.

§ 27. Boats and vessels.—Where supplies are furnished to a vessel at her home port in New York to fit her for a foreign voyage, to be paid for on her return, the contract creates no lien under the local law (2 R. S., 405, sec. 2). Remnants in Court, Olc., 382. See MARITIME LAW.

§ 28. A state may create a lien to attach to vessels, unknown to the admiralty law, and provide legal tribunals and a mode of procedure for the enforcement of such liens, other than proceeding *in rem*; but any attempt by a state to appropriate the remedy *in rem* is in conflict with the second section of the third article of the constitution of the United States. The Schooner *John Richards*, Newb., 73.

§ 29. The local law of California (Wood's Digest, art. 1051, sec. 817, p. 207), providing that all steamers, etc., shall be liable for supplies and for materials furnished in their construction or repair, etc., creates a liability against domestic vessels, etc., in favor of domestic creditors, but no lien that can be enforced in an action *in rem* in the admiralty courts of a sister state. *Price v. Frankel*, * 1 Wash. Ty, 43.

§ 30. Money advanced to the master of a ship and used by him in paying material-men and mechanics engaged in repairing the ship creates no lien upon the ship in favor of the lender, under local laws making vessels liable for materials furnished for their construction or repair. *Ibid*.

§ 31. The privileged lien against a vessel given to material-men by the Revised Statutes of Maine, chapter 125, section 35, amounts essentially to an hypothecation of the vessel to the privileged creditor. The hypothecary creditor has the same *jus in re*, or proprietary interest in the thing, as a pawnee or mortgagee, and his right to enforce the lien in admiralty is in no wise obstructed by the death or insolvency of the owner of the vessel. The *Young Mechanic*, 1 Ware, 535.

§ 32. A lien for materials furnished was acquired under the Oregon boat law of 1851. By the law of 1854, this law was repealed, and another mode of procedure instituted for enforcing such claims. *Held*, that the repeal of the former law did not divest such lien, and that it was regular and proper to enforce such lien by the procedure adopted by the latter law. *Steamer Gazelle v. Lake*, * 1 Or., 119.

§ 33. A maritime lien does not arise in a contract to build a ship, or in a contract to furnish materials for that purpose; and in respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and prescribe the mode of their enforcement, by seizure or otherwise, if not inconsistent with the exclusive jurisdiction of the admiralty courts. *Edwards v. Elliott*, 21 Wall., 532.

§ 34. The vendor of personal property has a lien for the purchase money if he retains the possession; but if he delivers the possession, there being no agreement that the title should not pass, and takes a mortgage, which is not renewed within twelve months as required by the local law, whereby such mortgage becomes void as to creditors of the vendee, he cannot claim a vendor's lien apart from the mortgage lien. *In re Leland*, 10 Blatch., 503.

§ 35. The vendor and vendee of personal property may, by contract, create a lien, good as between themselves, after delivery and surrender of possession by the vendor, the contract in such case creating a charge upon the property in the nature of a mortgage. *Gregory v. Morris*, 6 Otto, 619.

§ 36. The revenue laws of the United States give no priority over a prior legal lien. *United States v. Sheriff of Charleston District*, Bee, 196.

§ 37. Where money has been mixed or confounded with other money, and neither it nor any substitute for it is shown to be capable of ascertainment or identification, or to be in existence anywhere, the right of a person to follow it, and to claim a lien upon anything in respect to it, is gone. *Drake v. Taylor*, 6 Blatch., 14.

§ 38. A bill was filed by a stockholder in a corporation alleging that the stock held by him had been illegally issued, and praying that the illegality be inquired into, that a receiver be appointed, and that the company be enjoined from disposing of a sufficient amount of its property to indemnify the plaintiff. The prayer for an injunction and receiver was refused on the ground that the money received by the company had been mingled with its general funds and could not be traced, so that there was no specific fund or property upon which an equitable lien could rest. The defrauded party in such case is entitled to no priority over other creditors. *Whelpley v. Erie R'y Co.*, 6 Blatch., 271.

§ 39. For freight and storage.—Where a party refuses to deliver property on the ground that he has a lien for freight, and also for storage, he is not entitled, in an action against him by the owner to recover possession of the property, to judgment by reason of a lien for storage, where it is found that he has no lien for freight. *Sicard v. Buffalo, N. Y. & Pa. R'y Co.*, 15 Blatch., 525.

§ 40. State-prison contractor.—In a contract entered into August 1, 1871, between certain parties who afterwards became bankrupts, and the agent of the state prison at Auburn, for the labor of certain convicts, it was provided, in accordance with a statute of the state of New York (Laws of 1863, ch. 465, p. 803, § 1), that "any debt which may be due or become due from any contractor upon his contract shall be a lien in favor of the state upon the machinery

and tools used and owned by such contractor in operating such contract upon the prison premises. Such lien shall commence with the contract, and shall continue during the existence of the contract, and until the claim or debt shall be satisfied or canceled." *Held*, that the legislature had full power to declare what constituted a lien, and if no constitutional principle was violated, its declaration was conclusive; that the lien in this case came into existence upon the insertion of the above clause in the contract, and continued until the debt was paid. *In re Burt*,* 12 Blatch., 252; 13 N. B. R., 137.

§ 41. **For work done—Attachment.**—H. threshed grain at the request of J., on premises occupied by J., as agent of the owner, and advertised the same for sale within three months, as prescribed by the local law giving a lien, to "any person who shall bestow labor on any article of personal property," upon such property. J. in the meantime, as creditor of the owner, attached the grain. *Held*, 1st, that H., by putting the grain in the barn at the direction of J., did not waive or divest himself of his lien; 2d, that J.'s attachment on a pre-existing debt, with full knowledge of the particulars, was subject to the lien of H. *Hogue v. Sheriff of Lewis County*,* 1 Wash. T'y, 195.

§ 42. **Partition—Dower.**—In proceedings in partition, a recognizance or mortgage given for the principal of the widow's dower is but collateral; the lien is independent of such security, being created by the law itself. A partition agreement contained the following: "Out of this, one-third remains in the land, interest annually to be paid to E., the widow, and principal to be paid to the heirs of deceased at her death—\$3,756.08." The agreement also stipulated that the grantee was to give mortgages to the heirs for the one-third remaining in the land. These mortgages were never given, and the deed was delivered over without exacting, then or afterwards, the stipulated security. *Held*, in accordance with the above principle, that the lien in favor of the heirs was not lost. *In re Null*, 2 Fed. R., 71.

§ 43. **On property condemned and sold.**—Where property was proceeded against in the district court of the United States, condemned, forfeited and sold, for violations of the internal revenue laws, and, subsequent to the institution of such proceedings, mechanics filed liens and obtained judgments thereon in the state court, *held*, in ejectment brought against the purchaser at the condemnation sale, that the lienholders mistook their remedy when they brought suit in the state court; that under the proceedings *in rem* all persons holding liens were notified to come in and establish the same; that while, by such proceedings, the liens upon the *res* were divested by the sale, they attached at once to the proceeds in court; that the claimants should have applied to the district court to be allowed to participate in the proceeds of the sale, and not having done so, all claim to the property was lost. *Heidritter v. Elizabeth Oil-cloth Co.*, 6 Fed. R., 138.

§ 44. **Goods purchased to be liable for advances.**—An agreement that goods purchased shall be liable for the money advanced to buy them creates a lien which is good between the parties, although invalid against subsequent purchasers or judgment creditors; and if followed by a delivery of possession before the rights of third persons have intervened, it is good absolutely. A. advanced money to B. with which to buy skins, the same to be tanned by B. and sold by A., the proceeds, less A.'s advances and commissions, to be turned over to B. It was also agreed that the skins until sold should be considered as security for the moneys advanced. B. falling sick, A., by agreement, took possession of B.'s tannery to complete the work on the skins and sell them, the proceeds, after deducting expenses and advances, to go to B. Shortly thereafter B. becoming bankrupt, his assignee claimed the skins. *Held*, in accordance with the above principle, that B.'s property in them was not unqualified; that they were subject to a charge in the nature of a mortgage in favor of A., which was good as against B. or his assignees. *Hauselt v. Harrison*, 15 Otto, 401.

§ 45. **Stock of stockholders.**—Where a stockholder deposits collaterals to secure a note to a banking company, such collaterals being shares of the company and other securities, and the charter and by-laws of the company declare that the company shall have a lien upon the shares of its stockholders for any and all debts due by them to the company, *held*, that the company has a valid lien upon the stockholder's shares for the satisfaction of the notes of such shareholder; and as to the other collaterals pledged, the company has a lien thereon for other notes than the one for which they were specifically pledged, on the principle that the equities being equal between the general creditors and the company, possession of the securities give the preference. *In re Peebles*, 2 Hughes, 394. See CORPORATIONS.

§ 46. **On separate funds.**—It is a well settled principle that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has a lien on both funds to resort in the first instance for payment to that fund upon which the other party has no lien. *United States v. Duncan*, 4 McL., 607; *Russell v. Howard*, 2 McL., 489; *McLean v. Lafayette Bank*, 3 McL., 587.

§ 47. **Agreement to purchase lands.**—Where A. and B. entered into an agreement by which A. was to purchase lands with money furnished by B., the conveyances to be taken in

the name of B., and five years thereafter the lands were to be sold, one-half of the profits made by such sale to go to A. for his services and expenses, *held*, that the agreement was a charge upon the property, and gave A. a lien to the extent of the amount to which he should be found to be entitled upon the execution of the agreement according to its terms. *Seymour v. Freer*, 8 Wall., 202.

§ 48. **Bonds to be paid by levy of taxes.**—Where levee commissioners, after the issue of bonds, were required by law to levy a tax on the levee district for their payment, a holder of such bonds had no lien on the lands of the district subject to taxation. *Heine v. The Levee Commissioners*, 1 Woods, 246.

§ 49. **The homestead exemption** secured by the constitution of Georgia, adopted in 1868, does not affect liens created prior to that time, and cannot be set up in derogation thereof. *Townsend Savings Bank v. Epping*, 3 Woods, 390.

§ 50. **Judgments—Mortgages—Conflicting claims.**—Judgments having been obtained against a party which are a lien on his lands throughout a state, and certain other judgments having been subsequently entered against the same person, creating a lien upon his lands in a certain county of said state, the court orders the lands to be sold, reserving questions as to the application of proceeds. *United States v. Duncan*,* 4 McL., 207.

§ 51. An act giving a "lien of the highest dignity" on a saw-mill for logs, or anything furnished to such mill, necessary to carry on the work of the mill, cannot give the holder of such lien precedence over that of prior judgments, mortgages and other prior liens on the mill, such lien being different from a mechanic's lien, which is supposed to increase the value of the building on which it rests to the amount of the claim. *Townsend Savings Bank v. Epping*, 3 Woods, 390.

§ 52. The purchaser at a sale of a mill under such a lien, there being a prior mortgage, holds the property as the original owner held it, and has only the equity of redemption. *Ibid*.

§ 53. **Partnership.**—If one partner withdraws funds from the partnership and pays the taxes on his private estate therewith, the creditors of the partnership do not, in general, thereby acquire a lien upon the lands, although the land is subject to that debt as to others; and if his executors make a similar appropriation of the partnership funds, the rule is the same. *United States v. Duncan*, 4 McL., 607.

§ 54. Where the partnership property is not sufficient to pay the debts of the firm, the lien of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States; but when it has become his separate, individual property, the rule would be different. *Ibid*.

§ 55. The United States have no lien on the real estate of their debtor until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has made a voluntary assignment of all his property; or, the debtor having absconded, concealed, or absented himself, his property has been attached by process of law. Accordingly, where a collector of the revenue executed a deed of trust to indemnify his surety in his official bond from responsibility as surety on the bond, and also to secure him from existing and future indorsements for the collector at bank, *held*, that such conveyance was valid as against the United States, although it appeared subsequently that the collector was unable to pay all his debts at the time the conveyance was made; and although it was known to the surety at that time that the collector was largely indebted to the United States. *United States v. Hooe*, 3 Cr., 73.

§ 56. Where a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Bank of the Metropolis v. New England Bank*, 1 How., 234. See BANKS.

§ 57. **Dealings between banks.**—Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, etc.: accounts regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. So *held* where bills and notes were transmitted and indorsed by the New England Bank to the Commonwealth Bank for collection, and by the latter indorsed to the Bank of the Metropolis, which, upon the bankruptcy of the Commonwealth Bank, claimed a lien upon such bills and notes, or their proceeds, for the balance of account due from the Commonwealth Bank. *Ibid*.

§ 58. *Held*, that upon the second trial of the case of the Bank of the Metropolis against the New England Bank the following instructions to the jury would have carried out the opinion of the court, viz.: 1st. If the jury should find that the Bank of the Metropolis, at the time

of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills or notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to a lien against the New England Bank for the general balance of the account with the Commonwealth Bank. 2d. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks. 3d. But if the jury find that, in the dealings mentioned, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were, from time to time, suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis is entitled to retain against the New England Bank for the balance of account due from the Commonwealth Bank. *Bank of the Metropolis v. New England Bank*, 6 How., 212.

§ 59. Where a patentee gave an exclusive license to D. to use his patent for the manufacture of certain articles, and D. covenanted to pay the patentee a specified tariff, *held*, that the patentee had no lien upon the license to secure the tariffs. *Goodyear v. Congress Rubber Company*, 3 Blatch., 449.

§ 60. An innkeeper or other person furnishing food to horses employed in carrying the public mail has no lien upon such horses for the value of the food thus furnished, so as to entitle him to detain such horses as security for his debt, whether such horses belong to private individuals or are owned by the government. *United States v. Barney*,* 3 Hall L. J., 128; 3 Hughes, 545.

§ 61. Powers of attorney, though irrevocable by the party giving them in his life-time, are revoked by his death, and as instruments creating any lien or security for debts, or any authority to sell, they are *functi officio* and completely extinguished. Thus, where a party desiring to borrow money, offered another a bill of sale of a vessel as security, which, on reflection, the latter declined and took a power of attorney to sell same, believing upon advice of counsel that it effected as complete a lien. After the death of the first party, a court of equity will not direct a new security to be given, or direct that to be done which the parties supposed would be effected by the instrument agreed on between them. *Hunt v. Rousmanier*,* 3 Mason, 294.

§ 62. Revenue collectors.—The act of congress (vol. 4, p. 627, § 6) gives a lien upon the lands and real estate of a collector of internal duties and of his sureties to secure the amount of all debts due to the United States by such collector; but the personal estate of all liable to execution upon a joint judgment must be exhausted before land can be sold; nor can a court or its officers, for the sake of equality, seize the land of one of the debtors while personal estate remains which is liable to the execution, although that personal estate may belong to another who has paid his aliquot part of the debt. *United States v. Graves*,* 2 Marsh., 379.

§ 63. Enforcement.—Although a defendant setting up a lien in his answer fails to file a cross-bill to enforce it, it is the duty of the court to recognize such lien, and determine the amount of the same, on a bill to remove him as trustee. *McPherson v. Cox*, 6 Otto, 404.

§ 64. A court of equity cannot enforce a lien upon land until it is shown that it is impossible to obtain satisfaction from a forthcoming bond given upon a levy of execution upon personalty on the original judgment under the act of congress relative to collectors and their sureties. (Vol. 4, p. 627, sec. 6.) And *quære*, whether the forthcoming bond, being considered as a satisfaction of the judgment, operates as a discharge of the lien. *United States v. Graves*,* 2 Marsh., 379.

§ 65. Discharge prevented by fraud.—One cannot avail himself of a lien, the discharge of which he has prevented by his own fraud. *Carey v. Brown*, 2 Otto, 171.

§ 66. Interest may be computed on a lienable demand and a lien awarded for the entire amount. *Willamette, etc., Co. v. Riley*,* 1 Or., 183.

§ 67. Waiver.—An express contract, retaining a lien to a specified extent, is a waiver of the lien to a greater extent. Thus, where in sale of land a stipulation was made that the property should remain liable for the first payment, after which the vendors consented to rely on the notes of the purchasers, *held*, that all lien on the land was waived except for the first payment. *Brown v. Gilman*, 4 Wheat., 255.

§ 68. A lien is not destroyed by the mere fact of the holder of it taking a bill of sale of property including that covered by the lien, made for the purpose of giving such holder a preference over other creditors, such bill of sale being subsequently set aside as in violation of the bankrupt act. A. furnished logs to B., B. advancing money to enable him to do so. The logs were to

be sawed into lumber and sold by B., the proceeds to be shared equally. By express agreement the property in the logs was to be in B. to secure him for advances. A. being in straightened circumstances, made a bill of sale to B. of all logs then at B.'s mill, and of other property, the value of such logs, by reason of a fall in the price of lumber, not being sufficient to secure A. for his advances. A. being declared bankrupt and the bill of sale void, his assignee brought trover to recover the value of the logs. *Held*, that B. had in no manner waived or abandoned his lien. *Avery v. Hackley*, 20 Wall., 407.

§ 69. **Not attachable.**—A lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer, and is therefore not attachable as personal property, or as a chose in action of the person who is entitled to it. So held where an attempt was made to attach goods for the debt of a factor, in the possession of a warehouseman, where they had been placed by the factor, to whom they had been consigned for sale, and in whose favor a lien existed on the goods for money advanced to the owner. *Meany v. Head*, 1 Mason, 319.

§ 70. **Payment by note.**—A receipt as follows, "Received payment by note," does not extinguish the debt, unless taken as absolute payment, nor does it divest the lien of the original account unless there is evidence of a manifest intention to take the note as sole security. *Moore v. Newbury*, 6 McL., 472.

§ 71. The receipt of a promissory note is not satisfaction of an account, or a waiver of a lien for work done, unless accepted as such; and of this a receipt in full for services performed is only *prima facie* evidence, open to explanation. *Sutton v. The Albatross*,* 1 Am. L. Reg., 87.

§ 72. **Miscellaneous.**—Certain real estate in Richmond, Virginia, was purchased by Asa Snyder from the firm of Dunlop, Moncure & Co., \$10,000 being paid in cash, and five notes at one, two, three, four and five years, with interest calculated at six per cent., the legal rate in Virginia, given for the balance of purchase money, secured by deed of trust. The first note was placed in bank for collection by Dunlop, Moncure & Co., and Snyder, being unable to pay it when due, obtained from the Virginia Fire and Marine Insurance Company their check for the amount, giving his own note at ninety days with eight per cent. interest, upon the understanding that the insurance company were to hold the original note against the real estate in the same relation that the original holders sustained in the trust deed, the original holders, Dunlop, Moncure & Co., having nothing to do with the transaction. Ninety days afterwards Snyder executed a paper reciting the circumstances and agreeing that the note should be secured by the deed of trust, and should bear eight per cent. interest per annum. The facts with regard to the second and third notes were substantially the same. The fourth note, which was taken up by the insurance company, and the fifth note, which was still held by Dunlop, Moncure & Co., were admitted to be valid liens on the property. As to the first three notes it was held that they were never assigned by Dunlop, Moncure & Co.; that they were extinguished when paid, and that the obligation of Snyder to the insurance company arising out of the stipulations in writing could not constitute them a lien. *Dooley v. Fire and Marine Ins. Co.*,* 3 Hughes, 221.

§ 73. Whoever has acquired a specific lien on property belonging to a debtor is entitled to hold it against all persons who cannot show a higher equity. W. advanced money to B., taking as collateral security the assignment of a policy of insurance for \$10,000, on the proceeds of the money advanced. The ship containing the merchandise was lost at sea. B. also obtained from the insurance company a loan of \$7,000 on a bottomry bond on the ship *Tim*, wherein D. was surety. This ship performed her voyage safely; but B. had in the meantime failed. The insurance company sold the ship and applied the proceeds, so far as they went, to the payment of the debt of \$7,000. They did not proceed against the surety, D., for the balance; but, on his promise to indemnify them, retained from the loss on the policy a sum sufficient to cover the balance. *Held*, that W. was entitled to the whole amount of the policy, \$10,000, as the fund out of which his advances were to be paid, without deducting any claims of the company against B.; that his money was lent upon this specific security; that he had a prior and superior equity over the surety, D.; and that he had a right to be substituted in equity to the claim of the company on the bottomry bond against D., to the extent of the sum detained by them. *Wiggin v. Dorr*, 3 Sumn., 410.

§ 74. P. was a partner in the house of D., P. & Co., who were agents of V., and as such sold to C. merchandise consigned to them by V., for which C. refused to pay, because of a private claim set up by him against D., one of the partners. The firm afterwards consigned to V. an invoice of mahogany for sale, ordering the proceeds thereof to be passed to the sole credit of P. The mahogany was sold, and V. subsequently died, having a balance due to him from the firm. After the death of P., his administratrix having brought an action at law to recover the proceeds of the sale, V.'s administratrix brought a bill in equity, praying for an injunction to the suit at law, and claiming a lien on the said proceeds to balance *pro tanto* the debt due from the firm on account of C., and alleging negligence on the part of the firm in not collecting the debt from C. *Held*, that the doctrine of lien was not applicable to the case, because, first,

the claim was one sounding in damages, which was not the subject of a penal lien; second, it was not a lien created in the course of the factorage transactions of V.; third, the claims were not between the same parties, nor due in the same right. *Vose v. Philbrook*, 3 Story, 335.

§ 75. An agreement by a government contractor with a bank, giving the latter a lien on the drafts drawn by the former on the government for the proceeds of articles furnished to it under the contract, for advances made and to be made by the bank to enable the contractor to fulfill his contract, does not give the bank a lien on a judgment against the government, recovered by the contractor, as damages for annulling the contract; all the drafts drawn having been paid either to the contractor or to the bank, and none being included in the judgment. *Bank of Washington v. Nock*, 9 Wall., 373.

§ 76. A subsequent agreement by the contractor to pay the bank, out of any receipts from the government, for advances made to enable the former to prosecute a suit against the government for breach of contract, does not, where suit was prosecuted resulting in a judgment adverse to the contractor, give a lien upon a judgment recovered in a second suit, conducted under new regulations of congress, the bank having refused to make advances for the prosecution of such second suit, the money therefor being furnished by other parties. *Ibid.*

§ 77. Where a joint bond was executed, secured by a lien, and after it became due one of the obligors, by indorsement in writing, on condition of forbearance, agreed to pay twelve per cent. interest, semi-annually, instead of six per cent. annually, *held*, that the agreement did not invalidate the bond as a lien upon the land, nor at all affect it as to the other obligor or as to subsequent lienors; and that the payments made must be credited at the rate of six per cent., payable annually. *In re Hutchinson*, 2 Hughes, 245.

§ 78. Where the order of the court directed the trustee to sell certain lands, and reinvest the proceeds in a mortgage upon the same lands, the mortgage to be taken simultaneously with the giving of the deed, but the deed was executed by the trustee without taking any mortgage, and without the payment of the purchase money, *held*, that the lien for such purchase money was not lost by the execution of the deed, and that the proceedings of the court were a sufficient notice to all subsequent purchasers and incumbrancers, notwithstanding the trustee's acknowledgment in the deed that the purchase money had been paid. *Dickinson v. Worthington*, 10 Fed. R., 860.

§ 79. Where a party performs labor for another, in a case where he would be entitled to a lien for one part of his labor, and not for the balance, he may properly charge for his labor under two different accounts; and if the debtor, at the time of making payment of any sum to the creditor, fails to make an appropriation to one or the other of the accounts, the creditor may appropriate such sum to the account not protected by lien, at any time before he files his lien. *Christnot v. Montana Gold and Silver Mining Co.*, * 1 Mont. Ty, 44.

§ 80. Property was conveyed to E. as trustee, in trust, and for the use of W. during her life, with remainder over. E. was given power, upon W. joining voluntarily in the deed, to sell the property and reinvest the proceeds to her use. E. sold the property to R. in the manner directed, but appropriated the proceeds and used the same for the benefit of the firm of E. and C. of which he was a member. E. then indorsed to W., in the name of the firm, a deed of land executed by one J. to the firm, to secure her for the money appropriated by and considered deposited with the firm. Upon the firm becoming bankrupt, W. claimed a lien upon the land conveyed to the firm by J. *Held*, that as W. only had a life estate, the title to the proceeds of the sale to R. was in E., which being the case, W. had no money on deposit with the firm of E. and C.; that her claim was against E. alone, and he had no right to appropriate the firm's property, as against the firm's creditors, to secure such a claim; and that she had no lien upon such property. *In the Matter of Chisholm*, 8 Ben., 242.

§ 81. Where property against which valid liens exist is purchased by the government, such liens may be enforced against the property in the hands of the government. *Fox v. Revenue Cutter*, * 8 Am. L. Reg., 459; *Revenue Cutter*, * 11 Law Rep. (N. S.), 281.

§ 82. A contract to deliver three hundred hides, then in vat, to the plaintiff, as security to indemnify him for his responsibility for a debt due by the defendants, which has since been satisfied, will not constitute a lien upon the hides in favor of the plaintiff to indemnify him for his responsibility for another debt of the defendants, for which the plaintiff is liable, where the rights of a third person have intervened. *Talbot v. McPherson*, 2 Cr. C. C., 281.

§ 83. An act of the legislature of the state of Indiana authorized commissioners to borrow money for the purpose of constructing a canal, pledging the canal, its tolls, rents, profits and lands, to redeem the loan, bonds being issued to parties loaning the money. Subsequently, by another act, other bonds were issued, but only the faith of the state was pledged as security. A still later act provided that the bonds then out should be surrendered, and in place of them the holders should receive one-half in state stock certificates, and for the other half Wabash and Erie canal stock certificates. Upon suit brought by plaintiff, he having surrendered all his bonds except those first issued, it was *held* that said first bonds were a paramount lien

on the canal, its lands and revenues, and that said lien was not impaired by any act of his in surrendering all bonds held by him which belonged to the second issue, nor by any act of the state attempting to compel him to surrender such first issued bonds, his lien being protected by that provision in the United States constitution forbidding any state to pass a law impairing the obligation of contracts. *Trustees of the Wabash, etc., Canal Co. v. Beers*, 2 Black, 448.

§ 84. M. obtained a large sum of money from a bank, on false pretenses. With this money he bought several hundred barrels of pork and flour, receiving from the vendors memoranda containing receipts in full of payment, and agreements to deliver the goods on board of canal boats soon after the opening of canal navigation. M. sent these memoranda to G., a commission merchant of New York, and by indorsements thereon directed the goods to be delivered to G. or his order. Whereupon G. advanced \$1,000 on the pork and flour. Before the goods had been called for by G., and before the warehouseman had any notice of the alleged assignment to G., the property was attached by the bank. *Held*, that the transfer of the warehouse receipt to the commission merchant, and the advance made by the latter, did not create a lien paramount to that of the attachment; and that the money advanced not being equal to the value of the property left an attachable interest beyond the lien of the commission merchant, if such existed. *Gibson v. Stevens*, 3 McL., 551.

§ 85. A canal company created a loan for the benefit of the corporation, and for part thereof issued bonds. All the effects of the company were pledged, and said bonds were to have preference over all debts that might thereafter be created by the company; and in default of payments, it was agreed that the holders of the bonds might enter immediately into the receipt of the tolls and water rents, and the incomes of said company. Upon default of payment, *held*, first, that, of necessity, there was an implied understanding that the ordinary expenses of the company should be paid out of the rents, etc., and that the lien of the bondholders did not prevent such necessary outlay, as without such expenditure there could be no tolls or rents to pay out; second, that equity would prevent the issue, by the company, of interest-bearing notes for the purpose of circulation as currency, upon the understanding and agreement that such notes should be received in payment of toll and water rent, to the impairment of the bondholders' lien upon the effects, tolls and water rents of said company. *Valette v. White-water Valley Canal Company*, 4 McL., 192.

§ 86. The law of Virginia that "the estate of a guardian or curator appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her on account of his or her guardianship, to his or her ward, before any other debt due from him or her" (1 Rev. Code, ch. 108, sec. 12), *held* to give priority to the debt due to the ward, to any bond debt due from the testator or intestate, on his own account, but not to create a lien on the lands of the guardian so as to bind them in the hands of a purchaser. *Black v. Scott*, 2 Marsh., 325.

II. MECHANICS' LIENS.

SUMMARY—*Hauling quartz to mill*, § 87.—*Overseer of laborers in a mine*, § 88.—*Contractor with the owner*, § 89.—*Rights of mortgagees*, §§ 90-93, 95, 102.—*No priority*, § 94.—*Waiver of lien; collateral security*, §§ 96-99.—*Repeal of law before filing of notice*, § 100.—*Notice*, §§ 101, 102.—*Against a row of buildings*, § 103.—*Effect of undertaking filed in a suit*, § 104.—*Suit to enforce, a suit in equity*, § 105.

§ 87. Where under a statute (Statutes of Nevada, 1869, p. 61) it was provided "that all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done," the mill on which a lien is claimed, being one for crushing quartz and separating the precious metals therefrom, labor in hauling quartz to be crushed in the mill was held to be included in the statute. *In re Hope Mining Company*, §§ 106-8.

§ 88. Under the statute of Utah Territory, giving a lien to any person or persons performing work or labor upon any mine, or furnishing materials therefor in pursuance of a contract made with the owner or owners of such mine or of any interest therein, it was held that one who was not the general agent of the mining business, nor a contractor, and whose services were not of a professional character, such as those of a mining engineer, but who was the overseer and foreman of the body of miners who performed manual labor upon the mine, and who planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture, was entitled to a lien. *Mining Co. v. Cullins*, § 109.

§ 89. A contractor with the owner, who undertakes to erect a building, or some part or portion thereof, on certain terms, does not come within the letter nor the spirit of the act of congress of March 2, 1833, entitled "An act to secure to mechanics and others payment for

labor done and materials furnished in the erection of buildings in the District of Columbia," and cannot file a mechanic's lien. *Winder v. Caldwell*, §§ 110-12.

§ 90. Mortgagees and others acquiring interests in property against which a mechanic's lien is sought to be enforced have a right to call for strict proof of all that is essential to the creation of a lien; and that includes proof of the commencement of the work, of its character, and of its completion. *Davis v. Alvord*, §§ 113-17.

§ 91. The plaintiff entered into contract with the defendant to work for him in erecting and repairing a quartz mill and opening and developing a quartz mine in Montana Territory for the sum of \$2,500 a year. The parties had an accounting, and agreed that the amount found due should be a lien upon the mill and mine in equal proportions, and notices claiming a lien were filed. *Held*, that a lien did not arise from the contract of apportionment, or from the special contract under which the work was done, but from the work performed upon the property; and, if the priority of the lien be disputed, the plaintiff must be prepared to show a compliance with the provisions of the statute and to fix with certainty the commencement and the completion of the work. *Ibid*.

§ 92. A contractor has a lien for labor done on or things furnished to a railroad, in Iowa, superior to that of an antecedent mortgage. And where the labor was done or materials were furnished for a section or division of the road, the lien of the contractor extends to the whole road. *Brooks v. Railway Co.*, §§ 118-22.

§ 93. In Wisconsin mechanics' liens relate back to the commencement of the building, and have a priority over a mortgage given upon the building after its commencement, although the work was done and materials furnished after the mortgage was executed. *Quære*, what effect a suspension of the work for some considerable length of time might have, and whether or not a great change in the plans of the building after giving the mortgage would change the rule of priority. *In re Hoyt*, §§ 123-25.

§ 94. There is no priority among different mechanics' liens in Wisconsin, as all relate to the commencement of the building. *Ibid*.

§ 95. A mechanic's lien for labor done or materials furnished in the construction of a railway, in Iowa, relates back to the commencement of the railway, and has priority over a mortgage executed after the work of constructing some part of the railway has been commenced, and before the particular work was done, or materials furnished, for which the lien is claimed. But in the case of a mechanic's lien for repairs, the lien attaches from the time the repairs are begun, and is subordinate to a prior mortgage. *Taylor v. Burlington, etc., R. Co.*, §§ 126-32.

§ 96. Certain parties who had furnished material for use in the construction and repair of the lines of a railroad, or some of them, took the notes of the railway company for the amount due them, and also received as collateral security twenty of the bonds of said railway company, secured by a mortgage upon one of its divisions. Under section 2129 of the code of Iowa of 1873, it was provided that "no person is entitled to a mechanic's lien who takes collateral security on the same contract." *Held*, that the taking of notes was not the taking of collateral security; that the holder of a claim does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear that it was his intention to look to such security, and not to his lien; but that in this case, as the testimony tended strongly to show that the complainants did intend to rely upon the security of said bonds, and that the taking of said bonds as collateral security was not equivalent to taking security upon the identical property upon which a mechanic's lien was sought to be enforced, inasmuch as the bonds were secured on one of the divisions into which the whole railway was divided; and further, as it had been held by the supreme court of Iowa that a mechanic's lien upon a railroad does not embrace rolling stock, and the mortgage included "all the franchises, fuel, rolling stock, etc., belonging to said" division, etc., the complainants had waived their lien. *Hale v. The B., C. R. & N. R. Co.*, §§ 133-35.

§ 97. A builder had agreed, in writing, to do the brick work on sixteen houses, at a fixed price per thousand bricks, and to take in payment one of the houses at a price also fixed, a conveyance of the lot which said builder was to have being made, and the deed duly acknowledged and recorded and placed in the hands of a third person as an escrow, to be delivered when the work was done. During the progress of the work, and after the larger part of it had been done, dissatisfaction arose between the parties, and a new written contract was made, which, after reciting the former agreement, provided that the brick-work up to the first floor joists should be finished without delay. The price was changed, but the old agreement was referred to for the mode of measurement. It was then provided that the same was to be paid for in a negotiable note payable within three months from the date of the completion of the work, and then the first agreement should be canceled and declared null and void, and the escrow delivered to the grantor, otherwise said agreement to remain in full force and effect. Another paper, signed by both parties, recited the former agreements, that the work had been finished and measured, that the note provided for had been given, and that therefore the escrow was

declared null and void, and was to be delivered to the grantor. *Held*, that while, when a lien has once attached, the taking of such a note would not of itself operate as a release, in this case, as the builder under the first contract, under which the larger part of the work was done, was to take his pay not in money but in a lot on which one of the houses was built, no lien could accrue. *Grant v. Strong*, § 136.

§ 98. A special contract between a mechanic and the owner or builder of a house, for the work which the former is to do in constructing the house, does not necessitate the looking to the contract alone for security, nor prevent resort to the remedy provided by the lien laws. Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has vested in the premises. Thus, where a party furnished building material in the District of Columbia, under a special contract to be paid therefor by the conveyance to him of a certain lot of ground at a stipulated price per foot, and the owner, after the material was furnished, refused to convey the lot, or to pay for such material, the party was held to be entitled to his statutory mechanic's lien if he gave the required notice, unless the rights of third parties had intervened before he gave such notice. *McMurray v. Brown*, § 137.

§ 99. One who, for the purpose of securing payment, retains the title to property furnished a railroad company, takes collateral security within the meaning of the statute of Iowa (section 2129 of the code), and hence is not entitled to a mechanic's lien for said articles furnished. *United States Wind Engine Co. v. Burlington, etc., R'y Co.*, §§ 126-32.

§ 100. A party having a mechanic's lien does not lose his lien by failure to file the notice and account required by the statute before the repeal of the law under which his lien accrues. So also where the old laws are repealed and a new law enacted embodying the old laws. *In re Hope Mining Co.*, §§ 106-8.

§ 101. In the case of a mechanic's lien for labor done on or materials furnished a railroad, a subcontractor is required, under the law in Iowa, to give notice to the railroad company of his intention to perform or furnish the same, and afterwards to settle with the contractor, and to present the settlement to the railroad company. But this notice is designed for the protection of the railroad company; and a judgment having been rendered against it establishing the lien, such judgment is conclusive on the subject. A mortgagee of the railroad cannot object to the validity of the lien thus established, in a foreclosure suit subsequently brought, on the ground that such notice had not been given. *Brooks v. Railway Co.*, §§ 118-22.

§ 102. Where proceedings were had to foreclose a mortgage upon a railroad, and the plaintiffs, who had sold and delivered to the railroad company material for use in the construction and repair of its lines, or some of them, intervened and asked that the court order the payment of their claim out of the earnings of the road, but did not claim a mechanic's lien, it was held that the purchaser at the foreclosure sale had no notice of a mechanic's lien claimed or to be claimed by the plaintiffs. *Hale v. The B., C. R. & N. R. Co.*, §§ 133-35.

§ 103. A mechanic's lien may be filed against a whole row of buildings, where the contract was one and related to the row as an entirety, and not to the particular buildings separately. *Phillips v. Gilbert*, §§ 133-39.

§ 104. The effect of an undertaking filed in a suit upon a mechanic's lien under the eleventh section of the act of congress passed February 2, 1859 (11 Stat., 376), to pay any judgment that may be rendered upon or on account of the claim for a lien made by complainant, is to release the property from the lien and to oblige the complainant to have recourse for security of payment to the parties who entered into said undertaking; but a decree in equity cannot be made against the undertakers, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance. *Ibid*.

§ 105. A suit to enforce a mechanic's and laborer's lien is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. *Davis v. Alvord*, §§ 113-17.

[Notes.— See §§ 140-194.]

IN RE HOPE MINING COMPANY.

(District Court for Nevada: 1 Sawyer, 710-712. 1871.)

Opinion by HILLYER, J.

STATEMENT OF FACTS.—This is a petition filed by one J. A. Waddell, for leave to amend the proof of his claim by setting out as security therefor a

laborer's lien. Omitting such portions of the lien law as do not bear upon this case, it reads: "All persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done." Statutes of Nevada, 1869, p. 61. The mill upon which a lien is claimed is one for crushing quartz and separating the precious metals therefrom, and the labor performed by petitioner was hauling quartz for the bankrupt to be crushed in this mill.

§ 106. *Hauling quartz to a mill is "performing labor in carrying on the mill."*

This, it is said, is not "performing labor in carrying on the mill," but I think it must be so considered. These laws always receive a liberal construction in favor of the laborer's lien. The labor of hauling quartz to a mill of this character is indispensable to carrying it on, and the language of the statute will not have to be strained in the least to include within its terms the person performing such labor.

§ 107. *Repeal of law under which lien is claimed.*

Another point is made upon the repeal of the law. The labor in this case was performed while the laws of 1861 and 1869 were in force, and before the commencement of proceedings in bankruptcy; but the notice and account required by the statute to be filed with the county recorder were not filed until after the proceedings in bankruptcy were begun, and the laws of 1861 and 1869 had been repealed. On the 4th of March, 1871, the legislature passed a law which embodied all the old laws in relation to mechanics' liens, extended their provisions to a few objects not before included, and repealed all former laws on the subject, without any clause saving rights acquired under those laws. It is now claimed that the lien of the petitioner was lost because he failed to file his notice with the recorder before the repeal of the laws under which it accrued.

In the case of *Sabin v. Connor*, decided in this court, and recently affirmed on appeal to the circuit court, it was held that the lien given by these statutes was acquired by the performance of the labor, and that filing the notice and bringing suit within the time prescribed were merely means to be used to preserve the lien and make it available; that where, as in this case, the legislature had in one act consolidated all the old laws on the subject of mechanics' liens, and repealed the former laws, the new act was to be considered as substituted for and continuing in force the provisions of the old laws, rather than to have abrogated and annulled them; citing *Steamship Co. v. Jolliffe*, 2 Wall., 450, and *Wright v. Oakley*, 5 Met., 400; and that if it were otherwise, it must be held that the effect of the repeal was to blot out the old laws "as completely as if they had never been enacted," and the repealing act itself would be void so far as it impaired the obligation of the defendant's contract by taking away from him all remedy for its enforcement. These principles are decisive in this case. The laws in force at the time the petitioner made his contract and performed the labor under it were part of the contract. These laws gave him a lien upon the mill as a security for the wages of his labor, and when this lien is taken from him nothing of any value remains of the obligation of his contract. *McCracken v. Hayward*, 2 How., 608 (CONST., §§ 1656-58); *Bronson v. Kinzie*, 1 How., 311 (CONST., §§ 1650-55); *Smith v. Morse*, 2 Cal., 524; *Quackenbush v. Danks*, 1 Denio, 128.

§ 108. *Proof of claim in bankruptcy; waiver of lien.*

But the assignee insists that, admitting the petitioner had a lien, he has waived and surrendered it by proving his claim without reference to his secu-

city, and he relies on the cases of *Stewart v. Isidor*, 1 B. R., 129, and *In re Blass*, 4 B. R., 37. In both of these cases the decision turned upon the language of the twenty-first section of the bankrupt act, which declares in express terms that a creditor, by proving his claim, discharges and surrenders all unsatisfied judgments, and proceedings commenced. This case arises under section 20 of the act, which contains no language like that in section 21. I presume that whenever it appears that a creditor has proved his secured claim as an unsecured one, intending thereby to share in the general assets and avail himself of his lien also, or with any other fraudulent intent, the court will compel such creditor to surrender his lien to the assignee. But in this case any presumption of fraud is entirely overcome by the facts. The petitioner proved his claim in ignorance of the existence of his lien, and as soon as he discovered the mistake has asked leave to amend his proof. Intending no fraud, and being mistaken as to his rights, the petitioner should not be held to have waived or surrendered his lien. *In re Brand*, 3 B. R., 85; *In re Clark*, 5 B. R., 255. The petition is granted.

MINING COMPANY v. CULLINS.

(14 Otto, 176-179. 1881.)

ERROR to the Supreme Court of Utah.

Opinion by MR. JUSTICE WOODS.

STATEMENT OF FACTS.—Cullins brought suit against the Flagstaff Silver Mining Company of Utah, in a district court of the Territory of Utah, to recover wages alleged to be due to him from the company for services rendered, and to subject its property to a lien therefor which he claimed attached by virtue of the statute of the territory. The statute declared as follows: "Any person or persons who shall perform any work or labor upon any mine or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine, or of any interest therein, shall be entitled to a miner's lien for the payment thereof upon all the interest, right and property in such mine by the person or persons contracting for such labor or materials at the time of making such contract. Said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah." Compiled Laws of Utah, sec. 1221.

The answer of the company denied that anything save a small balance was due, and that the statute gave him a lien on its property therefor. The case was submitted to the court upon the issues of fact as well as of law. The court found that the company, a corporation organized under the laws of Great Britain, was, at the time the services were rendered, the owner of and engaged in working a mine called the Flagstaff Mine, situate in that territory, and that one J. N. H. Patrick was the general agent and manager of the company's mining and smelting business in America; "that on or about the 14th day of December, 1873, the said company, by said J. N. H. Patrick, its agent, for that purpose duly authorized, employed the plaintiff for an indefinite time thereafter to direct the work in its said mine, and with authority to employ and discharge miners, and procure and purchase supplies for working said mine; that it was the duty of the plaintiff by virtue of said employment to plan, oversee and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine; that the plaintiff while in the employment of said company performed

said duties, and in the performance thereof did some manual labor;" and that, at the commencement of the suit, there was due to the plaintiff from the mining company \$1,530 for wages earned by him under said employment. The court gave judgment for that sum, and declared it to be a lien upon the mine.

From this judgment an appeal was taken to the supreme court of the territory, by which it was affirmed. The company prosecutes this writ of error, and alleges that the courts below erred in declaring the judgment in favor of Cullins to be a lien on the mine. The precise question presented is, whether his services for the company were such "work and labor" as under the statute entitled him to a lien therefor upon the mine.

§ 109. *Construction of statute of Utah giving a lien for labor, etc., in mines. One employed to oversee the miners entitled to the lien.*

Statutes giving liens to laborers and mechanics for their work and labor are to be liberally construed. *Davis v. Alvord*, 94 U. S., 545 (§§ 113-17, *infra*). The finding of the district court makes clear the character of the services rendered by the defendant in error. He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. His services were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor, and that the district court rightfully declared the person who performed them entitled to a lien under the law of the territory.

We have examined all the cases cited by the plaintiff in error. None of them seem to be inconsistent with the views we have expressed. They decide that an architect and superintendent of a building; that a person employed to cook for men engaged in constructing a reservoir; that a contractor for the building of a railroad or the erection of a house; that the assistant chief engineer of a railroad company; that agents employed to disburse money and pay off hands who are building a house,—are not, under laws similar to the statute of Utah, entitled to a lien for their services. *Foushee v. Grigsby*, 12 Ky., 75; *McCormack v. Los Angeles Water Co.*, 40 Cal., 185; *Aikin v. Wasson*, 24 N. Y., 482; *Blakey v. Blakey*, 27 Mo., 39; *Caldwell v. Bower*, 17 id., 564; *Brockway v. Innes*, 39 Mich., 47; *Peck v. Miller*, id., 594.

The case which comes nearer supporting the contention of the plaintiff in error than any other is *Smallhouse v. Kentucky, etc., Co.*, 2 Mont. T., 443. But in that case the court says, that "from the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or

laborer, or that he labored directly in the construction of the buildings, but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named." That case is fairly distinguishable from the one now under consideration; but even if it fully supported the contention of the plaintiff in error, it is entitled to no more weight than the decision of the supreme court of Utah in the present case. Views similar to those we have expressed were declared by Williams, C. J., in *Willamette Falls Transportation & Milling Co. v. Remick*, 1 Or., 169, and by the supreme court of Nevada in *Capron v. Strout*, 11 Nev., 304.

It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor. *Stryker v. Cassidy*, 76 N. Y., 50; *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq., 389; *Jones v. Shawhan*, 4 Watts & S. (Pa.), 257; *Bank of Pennsylvania v. Gries*, 35 Pa. St., 423; *Knight v. Morris*, 13 Minn., 473.

It is not necessary in this case to go so far as these decisions would warrant. But we are clearly of opinion that, upon the facts found by the district court, the defendant in error, under the statute of Utah, was entitled to a lien upon the mine to which his services were applied. The judgment of the supreme court of Utah must, therefore, be affirmed.

WINDER v. CALDWELL.

(14 Howard, 434-446. 1852.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—Caldwell, who was plaintiff below, entered into a contract with Winter to furnish all the materials and do all the carpenter work required to a certain house to be erected in the city of Washington, for the sum of \$10,000. After the house was finished, the contractor filed a lien against the building, claiming this sum, together with sundry charges for extra work. A *scire facias* was issued to enforce this claim and a trial had, in the course of which numerous bills of exception were sealed by the court at the defendant's instance, which form the subjects of our consideration in this case.

§ 110. *When a scire facias contains traversable facts the plea is to the writ.*

1. The want of a declaration, though not the subject of exception below, has been urged here as an error. But we think this objection is without foundation. A *scire facias* is a judicial writ used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. In the present case, the bill of particulars of the plaintiff's claim is filed of record under the statute which gives this remedy, and it is recited in the writ and thereby made part of it, so that any further pleading on his part, to set forth the nature of his demand, would be wholly superfluous.

§ 111. *Unliquidated damages cannot be given in evidence as a set-off, but non-feasance or misfeasance may be relied on to defeat plaintiff's claim.*

2. In the written contract between the parties given in evidence on the trial it is stipulated that "the work is to be promptly executed so that no delay shall be occasioned to the builder by having to wait for the carpenter's work;" and also, "that in any and every case in which the carpenter shall occasion delay to the building the sum of \$25 per day shall be deducted for each and every day so delayed from the amount to be paid by this contract."

The defendant, under a notice of set-off, offered to prove "that in consequence of the plaintiff's not being ready to put up his work according to said contract, delay was occasioned by him in the construction of the building of not less than three weeks;" and also, "that the work and materials found and provided upon and for the said building were defective in quality and character and far inferior in value to what said contract and specification called for." The refusal of the court to permit such evidence to go to the jury is the subject of the first two bills of exception.

The statute which authorizes this proceeding gives the defendant liberty "to plead and make such defense as in personal actions for the recovery of debts." Had the plaintiff below brought his action of *assumpsit* on the contract the right to make this defense cannot now be doubted. For although it is true as a general rule that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of non-feasance or misfeasance immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages or recouped, not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part and to avoid circuitry of action. Without noticing the numerous cases on this subject it is sufficient to say that the cases of *Withers v. Greene*, 9 How., 213 (BILLS AND NOTES, §§ 1430-34), and *Van Buren v. Digges*, 11 How., 461 (CONTRACTS, §§ 1995-98), decided in this court, are conclusive of the question. The court below, therefore, erred in the rejection of the testimony offered.

§ 112. *Under the statute in force in the District of Columbia a contractor cannot file a mechanic's lien.*

3. The remaining bills of exception involve in fact but one prominent and important question, and the decision of it will dispose of this case. The right to file a "mechanic's lien," as it is usually denominated, is claimed by the plaintiff, under the act of congress of March 2, 1833, entitled: "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia." The first section of this act defines the persons who shall be entitled to this peculiar security and remedy as follows:

"All and every dwelling-house or other building hereafter constructed and erected within the city of Washington, in the town of Alexandria, or in Georgetown, in the District of Columbia, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided, by any brickmaker, bricklayer, stonecutter, mason, lime-merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber-merchant, or any other person or persons employed in furnishing materials for, or in erecting and constructing, such house or other building, before any other lien which originated subsequent to the commencement of such house or

other building. But if such dwelling-house or other building, or any portion thereof, shall have been constructed under contract, or contracts, entered into by the owner thereof or his or her agent with any person or persons, no person who may have done work for such contractor or contractors, or furnished materials to him, or on his order or authority, shall have or possess any lien on said house or other building for work done or materials so furnished, unless the person or persons employed by such contractor to do work on or furnish materials for such building, shall, within thirty days after being so employed, give notice in writing to the owner or owners of such building, or to his or to their agent, that he or they are so employed to work or to furnish materials, and that they claim the benefit of the lien granted by this act."

Does a master-builder, undertaker, or contractor, who undertakes, by contract with the owner, to erect a building, or some part or portion thereof, on certain terms, come within the letter or spirit of this act, or within any of the classes enumerated, as entitled to this special remedy? Such persons have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber or other materials for building, but employ others to furnish materials. If such contractor should by accident be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities.

The title of this act shows its policy and intention. It is to secure, to "mechanics and others, payment for labor done and materials found;" and the persons enumerated in the first section are plainly those mechanics and tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertakers or contractors who employed them. The act contemplates two conditions under which such labor and materials may have been furnished: First, on the order of the owner, who may act without the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, secondly, when they have been furnished on the order of a contractor or undertaker. In such cases the mechanic, or material-man, if he intends to look to the credit of the building, and not to that of the contractor with whom he deals, must give notice to the owner of the building within thirty days, of his intention to claim this security. The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent and sells the buildings, or incumbers them with liens; and thus, one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is, not to secure contractors who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price

stipulated. But the contractor is neither within the letter nor the spirit of the act.

A question has been made in the argument, whether the act of Maryland, of 19th of December, 1791, formerly in force in this District, is supplied or repealed by the act of congress now under consideration. But as the proceedings in this case are not within or under the act of Maryland, the question is not before us for decision. The plaintiff claims his right to support this proceeding under the act of congress alone, and if that fails him, his only resource is to his action on his contract. That he has mistaken his remedy the court entertain no doubt. If precedent were needed to justify this construction of the act of congress, it may be found in the reports of the supreme court of Pennsylvania, where similar legislation has always received the same construction. See *Jones v. Shawhan*, 4 Watts & Serg., 257; *Hoatz v. Patterson*, 5 W. & S., 537, etc.

4. It is unnecessary to notice particularly the exception to the form of the judgment. It is certainly not in the form required by the act; and although the act may be construed to prescribe the effect rather than the form of the judgment, there is no reason why the form should differ from the effect; or that, in words, it should give the plaintiff anything more than the law gives him, namely, execution of the property described in the *scire facias*. The judgment of the circuit court is, therefore, reversed, and *venire de novo* awarded.

DAVIS v. ALVORD.

(4 Otto, 545-549. 1876.)

APPEAL from the Supreme Court of Montana Territory.

Opinion by MR. JUSTICE FIELD.

This is a suit to recover a judgment against the defendant Charles Hendrie, for labor performed by Alvord upon a quartz-mine and a quartz-mill in Montana territory, of which that defendant is alleged to be part owner, and to enforce a mechanic's and laborer's lien upon his interest in the premises, for its payment.

§ 113. *Nature of suit to enforce mechanic's lien; properly brought up by appeal.*

It is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. The fact that, according to the modes of procedure adopted in the territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold and the proceeds be applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law. It is not an uncommon practice in many of the states for the courts to direct, in suits for the foreclosure of mortgages, a formal rendition of judgment for the amount due upon the obligations secured, instead of directing a reference to a master to ascertain and report the amount. *Rollins v. Forbes*, 10 Cal., 299.

§ 114. *Misjoinder of causes of action.*

The complaint is not open to objection for misjoinder of causes of action, because the personal judgment and the enforcement of the lien are both prayed for at the same time. The rendition of the judgment is only a mode

of judicially declaring the amount due, and in no respect affects the equitable jurisdiction of the court. The case is, therefore, properly brought here by appeal.

STATEMENT OF FACTS.—It appears from the record, that, on the 1st of August, 1869, the plaintiff entered into a contract with the defendant Hendrie, to work for him in erecting and repairing a quartz-mill and in opening and developing a quartz-mine in Montana territory, for the sum of \$2,500 a year. The mill was distant about a quarter of a mile from the mine, and it was part of the contract that one-half of the time of the plaintiff should be devoted to each.

The erection of the mill was commenced in August, 1869, and occupied about forty days. It was substantially completed in the fall of that year. Some iron guides only were put in during the summer of 1870. After that, nothing was done on the mill, except to make occasional repairs as they were needed. It does not appear when the work was commenced on the mine. The plaintiff states that, in 1870, he put up steam hoisting-works, laid tracks, and made cars, and did everything necessary to keep the mine in repair; but as to the commencement of the work in that year he is silent. The notices claiming a lien, and the affidavits attached, are not evidence on this point against the defendants.

§ 115. Strict proof of facts necessary to creation of mechanic's lien must be given, as when the work was commenced and completed, its character, etc.

The statute was designed to give security to those who, by their labor, skill and materials, add value to property, by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed is required, except within sixty days after the work is completed. Mortgagees and others acquiring interests in property against which such a lien is sought to be enforced have a right, therefore, to call for strict proof of all that is essential to the creation of the lien; and that includes proof of the commencement of the work, of its character, and of its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for notice of claiming a lien must be filed in the recorder's office within sixty days from that time. This proof must be furnished by the party who asserts the existence of the lien.

§ 116. Priority of liens; work done on different parcels of property.

From this statement the question as to the priority of the lien claimed by Alvord over the mortgages of the defendant Davis may be readily answered. The work being done on different parcels of property, the lien claimed on one is to be considered separately from that claimed on the other. The parties, the plaintiff and Hendrie, had an accounting on the 25th of June, 1871, when over \$3,700 were found due to the plaintiff. It was then agreed between them that this amount should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount thus apportioned were accordingly filed in the recorder's office on the following day. A lien did not however, arise from this contract of apportionment, or from the special contract under which the work was done: it arose from the work which was performed upon the property. It is the work of mechanics and laborers, or the material furnished by them or others, by which value is added, or supposed to

be added, to property, which creates the lien under the statute, upon notice claiming it being seasonably filed in the proper recorder's office.

§ 117. *Notice, time of filing.*

So far as the mill was concerned, the notice was filed too late. That building, as already stated, was completed in 1869, or at least in the summer of 1870, when the iron guides were put in. Occasional repairs, if subsequently made (of which, however, the record furnishes no evidence), could not be added to the work performed in the erection of the building months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs.

So far as the mine is concerned, there is no evidence of the time in 1870 when the work upon it commenced. The hoisting-works were put up, the track was laid, and the cars were made sometime during that year; but beyond this we are not informed. All this might have been done after the last mortgage held by the defendant Davis was executed and recorded in September of that year. We cannot presume, in the absence of proof to that effect, that the work was commenced before that time, and thus give to the lien for the work priority over the mortgage. The failure of the plaintiff to show the commencement of the work, when the proof of that fact was within his power, leads to the conclusion that the truth would not have subserved his interests. At any rate, as the case stands, there is nothing in the record which warrants a subordination of the interests of the mortgagee to the claim of the plaintiff. The finding of the district court, that one-half of the amount due to the plaintiff was a valid lien on the mine from August 1, 1869, and the other half a lien on the mill from that date, does not help the case; for that finding is only a conclusion of law. No facts are stated upon which the conclusion can be sustained.

Whilst the statute giving liens to mechanics and laborers for their work and labor is to be liberally construed, so as to afford the security intended, it cannot be too strongly impressed upon them, that they must not only bring themselves by their notices, as was done in this case, clearly within the provisions of the statute, but they must be prepared, if the priority of their lien be disputed, to show a compliance with those provisions, and to fix with certainty the commencement and completion of their work; in which particulars the proof here is wanting.

The decree of the district court of the territory must, therefore, be modified so as to give the mortgages held by the defendant Davis a priority over the lien of Alvord in the distribution of the proceeds arising upon the sale of the interest of the defendant Hendrie; and the cause will be remanded to the supreme court of the territory with directions to modify the decree in that respect; and it is so ordered.

BROOKS v. RAILWAY COMPANY.

(11 Otto, 443-452. 1879.)

APPEAL from U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The appellants, who were complainants below, are trustees in a mortgage made by the Burlington & Southwestern Railway Company on its road and other property to secure \$1,800,000 of bonds put on the market and sold. They instituted this foreclosure suit against the com-

pany, and brought in, during its progress, other parties who were asserting mechanics' liens on the road. Of these parties only the interest of O'Hara Brothers and Wells, French & Co., whose liens were by the court held to be paramount to that of complainants, remain to be considered in the appeal of the trustees from that decree.

The company was organized under the laws of Iowa to build a railroad from Burlington, on the Mississippi river, in a southwestern direction to some point on the Missouri river. From the initial point, at Burlington, to Viele, in Lee county, Iowa, they, by contract, used the track of a road already built between Burlington and Keokuk. From Viele to Bloomfield, in Davis county, they built and paid for their own track. From Bloomfield to Moulton, in Appanoose county, fourteen miles, they used the road of another company, already built, and from Moulton to Unionville, in Missouri, they built their own road. It is for the work and labor done and materials furnished on the latter piece of the road that the lien of the appellees was allowed by the court on the road and right of way, stations, etc., of the company from Viele Junction, in Lee county, to the South Iowa state line, in Appanoose county, in favor of O'Hara Brothers for \$39,763.24, and in favor of Wells, French & Co., for \$8,528.83.

It is conceded that the work for which these liens were allowed was done for the company by the parties claiming them, and no question is raised here as to its value, or to the liability of the company to pay for it. The fact is undisputed that before any of it was done, or the contract therefor made, the mortgage to the complainants had been executed and duly recorded. It was also undisputed that both the appellees, whose claim is now contested, were subcontractors, and that the only contract which the railway company made for labor and materials was with another organization, known as the Mississippi and Missouri Construction Company.

This purely artificial being, composed of the officers and some of the stockholders of the railway company, was organized for the purpose of building this road. It belongs to a class of corporations which have become well known of late years as instruments to enable the officers of railroad companies to make contracts with themselves to build the roads for their stockholders. In the present case, this construction company having sublet all the contract to one J. W. Barnes, very soon took itself out of the way, and by an agreement between it and the railway company, of which the following extract is found in the record, its existence ceases to be of any further significance in this contest:

"Contract between B. & S. W. Railway Company and the M. & M. Construction Company. Dated February 6, 1873.

"The railway company assumes all outstanding liabilities of the construction company, except officers' salaries. All previous contracts between the two companies are annulled.

"The railway company assumes the contract of J. W. Barnes for construction of portions of the main line and branch of the B. & S. W. Railway Company, and the payment of all estimates due and to become due thereon."

This leaves to be considered here the railway company, J. W. Barnes, the principal contractor for construction of the road, O'Hara Brothers, and Wells, French & Co., subcontractors, and the complainants. It is also to be observed that before the present foreclosure suit was begun, O'Hara Brothers

and Wells, French & Co. had both commenced legal proceedings in the proper courts of the state, and had, after a contest with the railway company, obtained judgments establishing their liens. It was after this that they were made defendants to this suit.

To these proceedings, Barnes, the principal contractor, and the railway company were parties, and we take it for granted that as against them the judgments established the validity of the liens. The judgments do not bind the appellants, as they were not parties thereto. The validity of the liens as against them, and, if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case.

§ 118. *In Iowa a mechanic has a lien on the whole land, and this includes railroads. Such lien is superior to that of a subsequent mortgagee.*

By the law in force when these transactions took place, a mechanic has, for labor done or things furnished, a lien on the *entire land* upon which the building, erection or improvement was made, which has been held to include railroads, and it shall be preferred to all other liens and incumbrances which shall be attached to or upon such building, erection, or other improvement made subsequent to the commencement of said building, erection, or other improvement. Revision of 1860, sec. 1853; Code of 1873, sec. 2139.

This provision, it will be observed, relates to the *land* on which the improvement is made, and gives the mechanic a paramount or preferred lien only as against other liens and incumbrances created *subsequently* to the beginning of his work. Those made *prior* to that time are unaffected by it. But section 1855 of the revision, now section 2141 of the code, makes a different provision in regard to his lien on the *building, erection and improvement* for which the lien is claimed. It reads thus:

“The lien for the things aforesaid on work shall attach to the *building, erections or improvements* for which they were furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.”

The mechanic, therefore, has a lien upon the *land* paramount to all rights accruing after the commencement of his work, and upon what he puts upon the land paramount to all other claims, whether created before or after that time. The decisions of the courts of Iowa are to this effect and the proposition is not disputed in argument here. Have the subcontractors in this case taken the necessary steps to establish their lien? What is required to initiate the lien as to all other persons but subcontractors is to be found in section 1851 of the revision of 1860.

“Sec. 1851. It shall be the duty of every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, to file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits and containing a correct description of the property to be charged with said lien and verified by affidavit.”

This section was subsequently modified by the following statute:

"AN ACT to amend section 1851 of Revision of 1860, relating to Mechanics' Liens.

"Sec. 1. Be it enacted by the general assembly of the state of Iowa, that the following words are hereby added to section 1851 of Revision of 1860, to wit: 'But the failure to file the claim, account, settlement or demand, in the time named in this section and in section 1847, shall not operate to defeat the claim or demand, nor the lien of the person supplying the labor or material, as against the owner, nor the contractor, nor as against any one except purchasers or incumbrancers without notice, whose rights accrued after the ninety days, and before the account, or settlement, or claim, or lien is filed.'

"Approved April 7, 1862."

§ 119. *Rights of a subcontractor by virtue of the mechanic's lien law of the state of Iowa.*

The statute, however, makes provision that a subcontractor who shall do the work which his principal had contracted to do shall by proper proceeding secure to himself the lien which arises from the work done or materials furnished. In such case there is a more complex affair. There are here the owner of the property, the principal contractor and the subcontractor, who, as well as prior and subsequent incumbrancers or lienholders, have rights to be affected. It may generally be supposed that the principal contractor has sublet his contract so as to leave a profit to himself. He is entitled, therefore, to see that his subcontractor does not take this profit. The owner is not bound for more than he agreed to pay the principal contractor. In view of these interests, section 1847 of the Revision, section 2131 of the Code of 1873, enacts that every subcontractor wishing to avail himself of the benefit of the act shall give notice to the owner of the land, before or at the time he furnishes any of the materials or performs any of the labor, of his intention to perform or furnish the same, and afterwards he shall settle with the contractor therefor, and having made the settlement in writing, the same, signed by the contractor and certified by him to be just, shall be presented to the owner. He is also required, within thirty days from the time the things shall have been furnished or the labor performed, to file with the clerk of the district court of the county in which the building is situated a copy of said settlement, and a correct description of the property to be charged with the lien, the correctness of which shall be verified by oath. As we have already seen, the act of 1862 declares that a failure to file this settlement shall not operate to defeat the lien as against any one except purchasers or incumbrancers without notice, whose rights accrued after ninety days and before the account or settlement or lien claim is filed. Appellants are not within this exception.

The record shows that there was filed in the office of the clerk of the district court of Appanoose county, on the 31st of October, 1872, a statement by O'Hara Brothers of a claim against J. W. Barnes, the principal contractor, and against the railroad company, of a mechanic's lien on their line of said road, from Viele, in Leo county, through Van Buren, Davis and Appanoose counties, in the state of Iowa, for work and labor done and to be done and materials furnished under Barnes' contract, in which they said they had already done work to the amount of \$265,000, of which \$180,000 had been paid. This was verified by the oath of O'Hara. An agreed statement of facts in the present suit states that, in filing their respective claims for mechanics' liens, settle-

ments had been made between the subcontractors and Barnes, and that the amounts claimed had been agreed to by Barnes in these several settlements.

§ 120. *Notices required to be given by the subcontractor.*

It is now urged by appellants against the validity of these liens that the notice of the lien to the railway company, which the statute required from the subcontractor, was never given, and if any direct written notice was necessary to the establishment of the lien in this suit it must be admitted that it is not proved. But we think there are two sufficient answers to this objection:

1. It is obvious that this notice to the owner of the property is for the purpose of enabling him to protect himself in his dealings with the principal contractor, so that he shall neither overpay the amount of the contract with the subcontractor, nor embarrass himself by having to deal with two contractors. This dealing with two contractors instead of one being an obligation which the law imposes on him for the benefit of the subcontractor, this notice is required for his protection. It can have nothing to do with the validity of the lien beyond ascertaining the amount of it to which the subcontractor is entitled as between those three. With prior liens it has nothing to do, and can have no effect on the rights of the holders of them. The initial proceeding for the establishment of the lien, on which all others rest, is the claim filed in the clerk's office of the proper court. In the case of *Bundy v. The K. & D. M. R. Co.*, 49 Ia., 207, the supreme court of the state held that the paper thus filed by a subcontractor imparted notice to the owner and principal contractor of the condition of the account between the parties.

2. Since this notice is designed for the protection of the owner, and was to be given to him, the judgment of the state court of Iowa establishing this lien against the railroad company is conclusive on that subject, and with that question the complainants in this court have nothing to do.

§ 121. *The mechanic's lien of the subcontractor extends to the whole road.*

The next objection very strongly urged by counsel for appellants is thus stated in the assignment of errors: The court erred in decreeing a lien on the property in Davis, Van Buren and Lee counties, the first division of the road, for work done in Appanoose county, the next division, on a contract which was dated and work begun after recording the mortgage in the latter county. As we understand this objection, it is founded on the idea that while, if the whole road had been uninterruptedly built under one contract, the lien of the contractors and subcontractors would have been good against the whole road, though they had contributed only to the building of a limited portion of it, yet because these subcontractors were only employed on one division of the road, after another had been finished, and under a distinct contract with the company made after that completion, the lien can only attach to the last section of the road, and even this is subordinate to the mortgage of the appellants.

One branch of the question here raised was very fully considered in the case of *Neilson v. Iowa Eastern Railway Company*, 44 Ia., 71. That was a case where, after the building of a railroad had been commenced, a mortgage was executed on its whole line, both where work had been done and where none had been done. After this the building of the road was continued under new contracts by persons who did work on the other parts of the road, and the question was whether they had *any* lien prior to that of the mortgage, and if so, whether it extended to all the road or only to that part built under the new contracts.

The court, after mature deliberation, decided both these questions in favor of the contractors. It held that the road was an entire improvement, within the meaning of the act, and that the continuance of it was a matter to be taken into the calculation of the mortgagees when the mortgage was made, and the lien for that work was by the statute given on the road as one improvement. The court, speaking of the policy of the statute, said "it is not desirable that the execution of a mortgage upon land on which a building or other improvement is in process of construction should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it the money already expended must ordinarily, to a great extent, be lost. Take the present case as illustrative. The intervenors are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the work. They foresaw that work and materials must be furnished by somebody, or nothing could be realized from what had been done."

§ 122. *That a railroad, a unit as to mortgages, is built in sections, does not limit the mechanic's lien to the section on which his work was done.*

But the argument most confidently urged here is that the road was built in sections, and that there was such a separation in space and time in the construction of them that they cannot be considered as one improvement within the meaning of the statute. The argument is that the road from Viele to Bloomfield is one road; that then it is interrupted, and the track of another company is used from Bloomfield to Moulton; that there another road begins which was constructed under another contract, and that no lien for work done here can attach to the road between Viele and Bloomfield.

The argument seems to us extremely technical and at war with the principle in which liens are allowed for work done subsequently to the creation of a mortgage. That doctrine, or rather the statute which the courts construed as giving a permanent lien under such circumstances, was in existence when the mortgage of the appellants was made. It entered into and became a part of their contract. They knew that the road was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it, a lien superior to that of the mortgage. Now that the venture in which both embarked is to end in loss to one or the other of them, there is no judicial propriety in straining the law to limit the rights of one party rather than those of the other. If that law, by its fair construction, gives the mechanic a lien for a few thousand dollars on the whole road, instead of a part of it, the law should prevail.

In every respect except this one of its construction, the road is a unit, an entirety. Its route is selected and surveyed as one road. It is owned and built and run by one corporation. Its trains run over it all. The mortgage of appellants can have no lien on any of the road beyond the first few miles, upon any other theory, for its descriptive language refers to the road as one and not as several subdivisions. It is not easy to see how it can be held to be one road for the purposes of the mortgage, and two or three pieces of road for the purposes of the mechanic's lien. This continuation of the road beyond Bloomfield was as useful to the security of that mortgage as the part between Viele and Bloomfield. Though the work was done from Moulton under another contract, there was never any suspension of the work on the whole road, beyond what is usual in roads built with limited means. There was

never any permanent arrest of the work, nor any intention to cease work on the road. The intersection of fourteen miles of another road between Bloomfield and Moulton does not destroy the identity of the improvement, nor convert it into two railroads.

Canal Company *v.* Gordon, 6 Wall., 561, is much relied on by appellants, and in one of its features, that now under consideration, it bears some analogy to this case. There, however, the part of the canal first finished, and which was held not to be subject to a lien for work done on that constructed afterwards, had been in full operation for some time. How long it had been finished and in use before work was begun on the new part is not stated in the report of the case. It may have been long enough to justify the belief that for a time the further prosecution of the work was abandoned, and its resumption an afterthought.

In the case before us the purpose of discontinuing the road was never for a moment entertained, and the actual work was resumed in a few months after its completion to Bloomfield. In that case the decision depended on the construction of a statute of California, which used the word "structure" where the Iowa statute uses the word "improvement." In that case, as was said in the opinion, we had no aid from any decision of the courts of the state. In the one before us we have several decisions of the Iowa court. *Neilson v. Iowa Eastern Railway Company*, 44 Ia., 71; *Equitable Life Insurance Company v. Slye*, 45 id., 615.

"A mechanic's lien," says the court in the latter case, "can, it is true, become paramount to a mortgage executed upon a partially erected building, provided the work be done or materials furnished for the purpose of completing the building. This is the plain provision of the statute, and, to our mind, it is not unreasonable. Whoever takes a mortgage upon a building in the process of erection should assume that the mechanics' work is to go forward, and he may form some estimate of the amount that will be required. The same is not true in regard to repairs or enlargements."

If Canal Company *v.* Gordon, *supra*, is at variance with the decision of the courts of Iowa, construing her own statute, we must follow the latter. They also meet our approval. Without examining other objections to the decree, or those to the lien of Wells, French & Co., we think what we have said covers the case.

. Decree affirmed.

IN RE HOYT.

(District Court for Wisconsin: 3 Bissell, 436-441. 1873.)

STATEMENT OF FACTS.—Petition by mechanics claiming priority as against a mortgage executed before the work was done or the materials were furnished. The question arises in proceedings in bankruptcy against the owners of the premises.

Opinion by HOPKINS, J.

The question now presented is, which has priority, the mortgagee or the mechanics? The mechanics and material-men claim that their liens take precedence of the mortgage, as well those growing out of contracts entered into after the giving of the mortgage as before; that in both cases their liens take effect by relation from the commencement of the building under the mechanic's lien law of this state (Taylor's Statutes, page 1762). By the first section of that act it is provided that mechanics and others shall have a lien for work

and materials used in the construction of any building, "before any other lien which originated subsequent to the commencement of the building." The question depends upon the proper meaning of that clause. I do not find that it has been directly passed upon by the supreme court of this state.

§ 123. *Under the statute of Wisconsin mechanics' liens attach upon the building from its commencement, and have preference over all liens attaching subsequently.*

In *Reese v. Ludington*, 13 Wis., 276, and *Jessup v. Stone*, id., 466, the question was whether a mortgage executed *prior* to the commencement of the building took precedence of mechanics' liens upon the building as well as the ground upon which it was situated, and the court held that the mechanics' liens were subordinate to the mortgage upon both the building and ground. In preparing the opinion it seems to have been assumed by the court that the liens attached as of the time of the commencement of the building, for the learned chief justice who wrote the opinion of the court says: "If we are correct in these views, the design was to give the mechanic a lien from the commencement of the building," etc. But it was claimed, inasmuch as that point was not directly before the court, that it was not authoritatively decided. I have therefore examined the question as if not decided, and construed the act according to my understanding of it.

It is apparent to my mind that the legislature designed that the claims of mechanics and others for work and materials should have preference to all liens created by the party after the commencement of the building; that such liens should relate back to the commencement of the building without reference to the time when the work was done or material furnished, provided such liens were filed and prosecuted as prescribed by the act. The statute, by declaring that such liens should be *before* any liens originating subsequent to the commencement of the building, impliedly fixed that time as the date of the lien. The provision will not admit of any other construction. The lien is a creature of the statute and has the force and effect given to it by the law of its creation.

What effect a suspension of work for some considerable length of time might have in any given case, it is unnecessary to consider, as in this case there is no claim that the work was not prosecuted without intermission; nor do I wish to be understood as deciding whether or not a great change in the plans of the building after giving a mortgage would change the rule of priority, as there are no facts before me now requiring such a decision. In the construction I have given to the act I have assumed the ordinary case of continuing the work without material interruption or alteration of plans, and have not considered what modifications should be made in other cases, if any.

In some of the states the statutes give a lien "from the commencement of the work," while in others they are like the statutes here, and as they have received an interpretation by the courts of those states, I am not without aid in construing our own. In the case of *The American Fire Ins. Co. v. Pringle*, 2 Serg. & R., 138, the supreme court of Pennsylvania construed a like provision in the statutes of that state as giving to the mechanic a lien for work from the commencement of the building, and held such lien to be prior to the lien of a mortgage given after the commencement of a building, although the contracts for the work for which the liens were claimed were made after the giving of the mortgage. That doctrine was afterwards approved and followed in *Penock v. Hoover*, 5 Rawle, 291; and in *Hern v. Hopkins*, 13 Serg. & R., 269, it was applied to a judgment lien obtained during the construction of a building,

which was held to be overreached by the relation of the mechanic's lien back to the commencement of the building.

In Maryland the statute is like ours, and the court of chancery of that state, in *Wells v. The Canton Co.*, 3 Md., 234, hold that mechanics' liens attach from the commencement of the building, and have preference over all liens attaching subsequently. In the state of Missouri there is also a mechanic's lien law for the city of St. Louis, like ours in respect to the clause now under consideration; and in *Dubois v. Wilson*, 21 Mo., 213, it is held that a lien of a mechanic for work and materials furnished under a contract with the owner overreached a mortgage placed upon the building after its commencement, although the work was done and materials furnished after the mortgage was executed. That court approved of and followed the case of *American Fire Ins. Co. v. Pringle*, *supra*.

§ 124. *Mechanics' liens have a priority over mortgages given upon the building, though executed before the work and materials were furnished.*

The counsel representing the mortgagees in those cases urged upon the attention of the court the same constitutional objections to the law as are presented here, but they failed to influence the judgment of those courts. Nor do I appreciate the force or pertinency of such objections. The mortgagee is chargeable with a knowledge of the law, and he must be presumed to have known the fact that a building was in process of construction when he took his mortgage. He should, therefore, have protected himself against liens of mechanics and others by the terms of his contract. His want of proper caution in not doing so cannot prejudice the plain statutory rights of mechanics, nor can he successfully maintain that the act impairs the obligation of his contract by postponing his lien to theirs, which he must have known might be the case when he took his mortgage. Presumptively, property is enhanced in value equal to the amount of the work and materials used in building upon it. It is true, as a general rule, that all improvements by a mortgagor inure to the benefit of the mortgagee without liability or expense to him, by increasing the value of his security. But the legislature have by this act modified that rule in the interest of labor, and postponed or subordinated the lien of a mortgage, and all liens created intermediate to the commencement and completion of a building, to the claims of mechanics for work and materials used in the building. I cannot see any constitutional objections to such an act. With the policy or propriety of the act courts have nothing to do. Those questions are for the legislature. But if it were otherwise I cannot see any valid objection to the principle or equity of the statute. This disposes of the question of priority between the mechanics and mortgagee, and subordinates the mortgage to their liens.

§ 125. *No priority among mechanics where the liens relate to the commencement of the building.*

The counsel for the mechanics discussed the question as to whether there should be any priority as between them. It seems to me that the view I have taken of the first question disposes substantially of this, for it follows logically from it that there can be no preference as between them. I have held that the mechanics' liens by relation date from the commencement of the building, not one but all. The circumstance of one commencing work first does not give any priority. They all stand on the same footing and are to be paid in full or *pro rata*, as the funds may suffice. Such is the express provision of the statute of New Jersey. But without any statute such construction is the most

just and equitable. The building is the result of the labor of the mason, carpenter, bricklayer, plasterer, glazier and painter. It is the joint product of the skill of the artisan and the means of the material-man. Each contributed, and each should share alike without preference. Some one of the various kinds of mechanics must commence first, but the accident of commencing does not give that one any superior equity.

There is a like statute in the states of California and Oregon, and in both of these states it has been held that all liens arising under the act stand upon the same footing. All relate to the commencement of the building, and none have priority over the others. *Moxley v. Shepard*, 3 Cal., 64; *Crowell v. Gilman*, 18 id., 370; *Willamette Co. v. Riley*, 1 Or., 183. Logically these cases support as well the first proposition hereinbefore discussed, for they each hold that such liens by relation take effect from the commencement of the building. If so, they must necessarily overreach all subsequent mortgages or transfers. I do not find, nor was I referred by the learned counsel to, any case holding a different doctrine.

In the state of Ohio, where the law gives a lien only "from the commencement of the work or furnishing materials," the supreme court, in a remarkably well considered case, *Choteau v. Thompson*, 2 Ohio State, 114, hold that the act creates no priority as between the mechanics and material-men; that, though they commenced work at different times, they were to be paid equally. The decision is based upon the manifest equity of the statute, in view of the position in which each mechanic stands to the building. The lien holders, or some of them, I understand, have taken judgment for the amount of their liens. I do not wish to be understood as expressing any opinion upon the validity of such judgments, or as sustaining the right of a party to proceed to judgment after bankruptcy proceedings are commenced. These matters are reserved until the debts or judgments are proved and properly before the court.

TAYLOR v. BURLINGTON, CEDAR RAPIDS & MINNESOTA RAILWAY COMPANY.

(Circuit Court for Iowa: 4 Dillon, 570-583; 4 Central Law Journal, 535. 1877.)

STATEMENT OF FACTS.—Taylor and others are the plaintiffs in the principal suit, and are the trustees in deeds of trust executed by defendant to secure bonds, etc. Wells, French & Co. and others filed petitions in the cause (which was pending for foreclosure of the mortgage), setting up mechanics' liens for work and materials furnished in the construction of the road. The special facts connected with these are set out in the opinions of the court.

Opinion by DILLON, J.

In the various railway foreclosure cases in this court, there are probably forty intervening petitions filed seeking to establish, on behalf of the claimants, mechanic's lien on the property covered by the railway mortgages. The trustees in these mortgages resist the right to any lien whatever, in many cases, and particularly resist the establishment of a mechanic's lien in any case where the labor was done, or the materials were furnished, after the recording of the mortgage, which shall have priority over the mortgage. There are also questions as to the lien for repairs after the road has been completed, as distinguished from the right to a lien for original construction; and questions, also, as to limitation of the lien of the mechanic.

The most important of these questions are presented in the case of Wells,

French & Co., and that has, therefore, been selected as the one in which to state the conclusions at which the court has arrived. In many respects nothing is more unlike than the erection of an ordinary building and the construction of and equipment of a line of railway, and much of the difficulty in construing the legislation of the state has arisen out of the grouping of the two by the legislature and making a uniform or single provision for both. The duty of the court is to feel its way to the legislative intent and give that intent effect as far as it may. Wherever the statute has been construed by the supreme court of the state, that construction will be accepted as a rule of decision by this court. While we have considered every decision of the state supreme court which bears upon the questions before us, and also the full and exhaustive discussions of counsel, it is not proposed to go into an elaborate exposition of the different provisions of the statute, but mainly to state the results to which our examination has brought us.

§ 126. *Mechanics and material-men are entitled in Iowa to a lien on railways for their work and materials.*

The mechanic's lien statute (Code, secs. 2130, 2132) extends, *inter alia*, to all persons "who construct or repair any work of internal improvement," including railways, and gives a lien "for labor done, or materials, machinery or fixtures furnished," upon "such building, erection or improvement, and upon the land belonging to the owner, on which the same is situated." Sec. 2130. Another section provides for the filing of the claim with the county clerk within ninety days after the work is done, and declares what shall be the effect of a failure to file. Sec. 2137.

Section 2139 first provides for the priority of mechanics' liens **as among themselves**, making the same depend upon the order of filing, and then proceeds to exact that such liens "shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or improvement." The lien extends to the entire land to the extent of the interest of the person for whom the mechanic did the work or furnished materials, and to a leasehold interest, as to which the provision is that the forfeiture of the lease shall not impair the mechanic's lien as to the buildings, but the same may be sold to satisfy the lien and be moved off within thirty days after the sale. Sec. 2140.

Section 2141 provides for still another case in these words: "The lien for the things aforesaid, or work, shall attach to the buildings, erection or improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." Sec. 2141. The suit to enforce a mechanic's lien must be in equity. Sec. 2510.

§ 127. *The mechanic and material-man's lien on railways for labor and materials relates to the commencement of the work, and is prior to a mortgage executed after some part of the work had been done, but before the work in question had been done.*

We hold as follows: 1. Section 2139 contemplates and provides for a case where, at the time of the commencement of the building or railway, there is no recorded lien or incumbrance thereon, and where such lien or incumbrance

is created subsequent to the commencement of the building or railway; in which case the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done, or his materials were furnished, after a mortgage was recorded or lien created.

As to an ordinary building the proposition just stated admits of no doubt; indeed, it has been expressly decided to be correct by the supreme court of the United States, in respect of an enactment copied from the Iowa statute. *Davis v. Bisland*, 18 Wall., 659. As to the application of this principle to railways the decision of the supreme court of Iowa is conclusive. *Neilson v. Iowa Eastern Ry Co.*, September term, 1876, 10 West. Jur., 604; S. C., 44 Ia., 71.

Construing section 1853 (the same as section 2139 of the code of 1873), it was decided, in the case last cited, that the lien of the mechanic dates from the commencement of the railway, treating it as an entirety, and has priority over a mortgage executed after the work of constructing some portion of the railway has been commenced, and before the particular work was done, or materials furnished, for which the mechanic's lien is claimed.

§ 128. *The relative rights and priorities of mechanics and mortgagees.*

2. Section 2141 makes provision for a still different case. This section contemplates and provides for a case where there is a mortgage, lien or incumbrance upon the land prior to the time when the owner commences "a building, erection or other improvement thereon." What, then, are the relative rights of such prior incumbrancers and the mechanic? This is plainly determined by the section itself. As to the land, the mortgage is declared to retain its priority; but as to the buildings, erections or improvements put upon the land subsequent to the mortgage, the mechanic has priority over the mortgage — may enforce his lien accordingly, and have the building, erection or improvement sold on execution, and remove the same within a reasonable time.

The mechanic has, in such a case, the same right as against the mortgagee that he has as against the lessor under the preceding section. This view, to the extent just stated, is in accordance with the decision of the supreme court of the state in *Getchell v. Allen*, 34 Iowa, 559, which case, so far as it relates to an "independent erection on the land," is undoubtedly correct, and is approved, at least to this extent, by the same court in the subsequent case of *Neilson v. Iowa Eastern Ry Co.*, *supra*.

3. But suppose the prior mortgage attaches not only to land, but to a completed house, or other erection or improvement thereon, and the house or other improvement is repaired by the mechanic, at the instance of the owner — what, then, are the relative rights of the mortgagee and the mechanic? This was the question which gave so much trouble to the state supreme court, as will be seen by reference to *Getchell v. Allen*, and the first opinion of that court in the *Neilson* case. Under section 2130, undoubtedly, the mechanic has a lien for repairs to a building erected and completed before the repairs were begun. That section uses the word "repairs," and reparations by a mechanic are within the remedial purpose of the legislature. But when does such lien attach, and how is it to be enforced? As against the owner, the lien attaches from the time the repairs are begun. This is plain enough, and just. But when does this lien attach as against a prior mortgagee of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs do not give

a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgagee out of existence by making repairs *ad libitum*, and furnishing the owner the necessary credit therefor, by giving the mechanic and material-man a lien paramount to the mortgage. Such a view has neither law, justice, equity, nor public policy to recommend it. This conclusion accords with the opinion of the supreme court on this point in one branch of the case of *Getchell v. Allen*. To such a case section 2141 of the code does not apply — that section only applying to cases where the lien of the mechanic is sought with respect to improvements which were not on the land when the prior mortgage was taken, and on the security of which the mortgage did not rely.

Suppose a lessee improves the house of the lessor, it would hardly be contended, under section 2140, that the mechanic could sell the whole house under his lien, and move it away. Nor, under section 2141, can he do this with respect to a building covered by a prior lien. The provisions and purpose of the two sections, in this regard, are the same.

Where there is a prior lien on the building or railway, these once having been completed, and a mechanic subsequently does work, or furnishes materials, he has a lien, but a lien subordinate to the mortgage, and which must be enforced as such, and it is accompanied with no right of removal. This view accords with the language of the statute and with its policy, and leads to just results. Any other view leads to confusion and injustice.

Applying these principles to the case of Wells, French & Co., the result is this: 1. As respects the bridge furnished in 1874, after the execution of plaintiffs' mortgage, and after the road had been completed, to replace a bridge which had been carried away, any lien which it would be possible to get therefor would be subsequent to the mortgage. 2. The same principle applies to the coal cars furnished in 1873, even if it were conceded that there was a lien upon a railroad for cars furnished to use thereon, which is at least doubtful. *New England Car Co. v. Baltimore & Ohio Railroad*, 11 Md., 81. 3. As to the two spans of bridge furnished in December, 1873, for the original construction of the Muscatine division, the petitioners are entitled to a lien, if they have complied with the provisions of the statute in respect to filing their claim and bringing suit to enforce it. Code, secs. 2137, 2138, 2529. As these were delivered December 26, 1873, the case falls within the code of 1873, and not the revision of 1860.

§ 129. *Within what time mechanics' liens must be enforced.*

Under the code of 1873 (sec. 2137), the mechanic may file his lien within ninety days, etc., "but a failure to file the same within the time aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the ninety days and before any claim for the lien was filed."

"Actions to enforce a mechanic's lien must be brought within two years from the time of filing the statement in the clerk's office." Sec. 2529. The two bridge spans in question were delivered December 26, 1873; statement for lien filed November 9, 1875, and the petition filed to enforce and establish the lien December 14, 1875, which was within the two years. As against the railway company the failure to file the statement for a lien does not defeat the lien, and there are no incumbrancers or purchasers whose rights accrued after the ninety days and before the same was filed. The supposed defect in the

statement, if not cured by the stipulation, is not of such a nature as to defeat the lien. For the amount due for these two spans, \$1,313.85, with interest, the petitioners are entitled to a lien prior to the mortgage.

Love, J., concurs.

INTERVENING PETITION OF THE UNION ROLLING MILL COMPANY.

Opinion by DILLON, J.

At a period distinctly after the railroad was finished and had long been operated, the rolling mill company "furnished to the railway company (in April, June, August and December, 1874), iron and steel rails for the repair of their lines of railway; which rails were placed in their said railway, and have ever since been and are now used as part of the track thereof." The mortgages were recorded years before.

§ 130. *The lien for materials furnished to repair a railroad is subsequent to a prior mortgage.*

This petition raises the single question whether a lien exists under the mechanic's lien statute for repairs to a railway previously completed and in operation, which is superior to the lien of a mortgage made and recorded before the repairs but subsequent to the original commencement of the work of constructing the railway. This question is covered by the principles laid down in the case of Wells, French & Co. The petitioners have a lien, but it is subsequent to the mortgage. The result would have been different if the rails had been furnished for the original or first construction of the road.

Love, J., concurs.

INTERVENING PETITION OF THE UNITED STATES WIND ENGINE AND PUMP COMPANY.

Opinion by DILLON, J.

The petitioner, on December 6, 1875, filed its petition to recover out of the fund in court, or have returned to them certain wind-mills, and articles supplied to repair the same, furnished on and since November 30, 1873. The petition alleges that pumps and engines had been furnished before that, but all that were furnished prior to November 15, 1873, had been paid for. It alleges that said mills and fixtures were furnished to said railway company by virtue of a "verbal agreement that they were to be paid for in monthly instalments, and the wind company were not to relinquish their title until they were paid; and it was expressly understood, in case of default the plaintiff should have the right to take and remove the mills and fixtures" (see the first bill). The defendant answered, denying the agreement as to title, and averring that said contract was not in writing, acknowledged and recorded, and could not be enforced. Upon the coming in of this answer, the plaintiff, on the 21st of March, 1876, filed a mechanic's lien claim, and amended its bill, claiming alternatively a mechanic's lien, not only for the wind-mills and pumps, but for the supplies and repairs of the same. The right to a mechanic's lien is denied by an answer filed to the amended petition. The material stipulation in the agreed facts is as follows: "An agreement or understanding existed between the United States Wind Engine and Pump Company and said railway company that the title to all the property delivered should not vest in the railway company until paid for; but said agreement was not in writing, and was never recorded."

The petitioner asks alternative relief. 1. They claim that effect should be given to the verbal agreement as to the title remaining in the petitioners until payment for the engines was made. The answer of the trustees is that, the agreement not being recorded, it cannot avail as against them without notice of it. All the engines delivered before November, 1873, have been paid for. It is those delivered after that date that are in controversy. If regarded as realty, the recording statute would give the priority to the mortgagee without notice. If personal property, the act of 1872 (Code, sec. 1922) declares the condition as to retaining title invalid against creditors without notice, unless the investment be in writing and recorded. It was neither in writing nor recorded. Nor is it shown that the trustees in the railway mortgage had notice thereof. It is not stated in the stipulation when the agreement as to title remaining in the seller was made, but as engines were sold from time to time, beginning in April, 1870, it is argued that the agreement must have been made prior to that time, and hence it was a continuing agreement, antedating the statute, and hence, under our decision in the Haskell & Barker Car Company case, it need not be recorded. But in that case there was an agreement in writing prior to the statute, and specifically relating to the cars in dispute. In this case it is not shown that, prior to the statute of 1872 (Code, sec. 1922), the parties made a contract which bound the petitioners to furnish and the railway company to receive the engines now in dispute, viz., those delivered after November, 1873. The statute (sec. 1922), therefore, applies, and must have effect if the trustees in the railway mortgage are "creditors" of the railway company within the meaning of the section.

§ 131. *Sale of engines, etc., to railway company subsequent to execution of mortgage on railway, seller reserving title by verbal agreement; rights of mortgagees.*

The railway mortgages, under which the trustees claim, were made and recorded prior to the delivery of the engines here in question. The statute of the state authorizes railway companies not only to mortgage their existing property, "but also property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property was in possession at the time of the execution thereof" (Code, sec. 1284); and the recording thereof "shall be notice to all the world of the rights of all parties under the same" (Code, sec. 1285).

The railway mortgages were executed and recorded prior to the delivery of the engines not paid for, and cover all after-acquired property pertaining to the railway. These engines are on the right of way, are essential to the use of the railway, and are part of it. They fall within the property embraced in the mortgage. But it is claimed that, as to after-acquired property, the mortgagee must take it *cum onere* (United States v. New Orleans Railroad, 12 Wall., 362; Conv., §§ 1310-14); and as the stipulation as to title being retained by the seller is good between the parties, it is likewise good as to the mortgagee or trustees. Treating these engines as in the nature of personalty or removable fixtures, I am inclined to think, aside from the requirements of section 1922 of the code, that this position would be sound. But the mortgagees are creditors of the railway company, and such verbal unrecorded agreements are declared to be invalid against "any creditor" (prior or subsequent) without notice, and are probably ineffectual as against the trustees in the railway mortgage in actual possession under the mortgage.

§ 132. *Lien waived by taking collateral security.*

2. As to the claim for a mechanic's lien, section 2129 of the code enacts that "no person shall be entitled to a mechanic's lien who takes collateral security on the same contract." It is admitted that, for the purpose of securing payment, the vendors made a contract to retain the title. This would be good between the parties, and would be good against creditors if it had been reduced to writing, acknowledged and recorded. A seller who undertakes to secure himself in this specific way, showing that he does not rely upon the lien given by the statute to the mechanic or material-man—a way inconsistent in its nature with a right to a lien under the statute—takes "collateral security" within the meaning of the statute, and hence is not entitled to a mechanic's lien.

Petition dismissed.

LOVE, J., concurs.

HALE, AYER & CO. v. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

(Circuit Court for Iowa: 2 McCrary, 558-565. 1881.)

Opinion by MCCRARY, J.

STATEMENT OF FACTS.—The complainants bring this suit for the purpose of establishing and enforcing a mechanic's lien against the lines of railway now run and operated by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, the main line extending from Burlington, Iowa, to Postville, Iowa; the Pacific division extending from Vinton to Traer; the Muscatine division extending from Muscatine to Riverside; and the Milwaukee extension from Linn to Postville. A lien is also claimed upon the rolling stock of said road, upon the right of way, road-bed, station houses, car and engine houses, machine shops and all property or things whatsoever belonging or in any way appertaining to said lines of railway. It appears in proof that the plaintiffs, who are iron merchants at Chicago, Illinois, during the year 1873, and between the first of March and the last of December of said year, sold and delivered to the Burlington, Cedar Rapids & Minnesota Railway Company, then owning and operating said lines, material for use in the construction and repair of its lines, or some of them, as shown by the bill set out as a part of the petition in this case. That in May, 1875, proceedings were commenced to foreclose certain mortgages upon the said Burlington, Cedar Rapids & Minnesota Railway, and for the appointment of a receiver thereof.

In that case, the complainants, Hale, Ayer & Co., filed their petition of intervention, wherein they prayed that the court would order the receiver of said railway to pay their said claim out of the earnings of said railway, but not claiming a mechanic's lien.

Such proceedings were had in the foreclosure cases that at the October term, 1875, of this court, a decree was rendered and the sale of the railway was ordered, subject, however, to the claims of parties who had intervened in the case, including the said Hale, Ayer & Co. From the said decree an appeal was prosecuted to the supreme court of the United States, where it was held that the intervenors (plaintiffs herein) were entitled to payment out of the earnings of the road of so much of their claim as was shown to be in the nature of supplies, but that for all that part which was for construction, they

were not entitled to payment from such earnings. After the decree in the court below, and pending said appeal, these proceedings were instituted under the statute of Iowa for the purpose of enforcing a mechanic's lien for so much of the claim as was for materials furnished for construction purposes.

At the time of furnishing the supplies in question, Hale, Ayer & Co. took the notes of the railway company for the amount due them, and also received as collateral security twenty of the bonds of the said railway company, secured by mortgage upon what was known as the Pacific division of said railroad. At the sale under the decree of foreclosure, the entire line of railroad was purchased by the defendant herein, the Burlington, Cedar Rapids & Northern Railway Company.

Upon these facts several questions have been discussed by counsel, two of which only will be considered. These are: *First*. Whether a mechanic's lien was waived by taking collateral security. *Second*. Whether the defendant, the Burlington, Cedar Rapids & Northern Railway Company, purchased the road with notice of the complainants' claim of a mechanic's lien.

§ 133. *What is taking a collateral security, and in what cases it will operate as a waiver of a mechanic's lien.*

A decision of the first question requires a construction of section 2129 of the code of Iowa of 1873, which declares that "no person is entitled to a mechanic's lien who takes collateral security on the same contract." This statute has been several times considered and construed by the supreme court of Iowa, whose ruling upon the question of its construction we are bound to follow. In several cases that court has held that the acceptance of promissory notes for work and labor performed or materials furnished in the erection of a building or other improvement will not divest the right of a party to a mechanic's lien, unless such is the agreement of the parties. *Bonsall v. Taylor*, 5 Ia., 546; *Scott v. Ward*, 4 G. Greene, 112. The taking of notes is not the taking of collateral security.

It has also been held, that where a party has done work or furnished materials in erecting a building under a contract with the owner, he does not waive his lien upon such building by accepting the promise of a subsequent purchaser of the building, made in consideration of forbearance to sue, to pay for such work or materials. *Mervin v. Sherman*, 9 Ia., 331. The court in that case, per Wright, chief justice, defines the words "collateral security" to mean "either a separate obligation attached to the contract named, to guaranty its performance, or it may be the transfer of property or other contracts to insure the performance of the principal agreement, and in any event, the contract, promise or property taken must have been intended and accepted as collateral security before the lien could be said to be waived or defeated."

The latest case upon the subject is that of *Gilchrist v. Gottschalk*, 39 Ia., 311, where it is held that the acceptance of a mortgage for the same debt upon the same property covered by a mechanic's lien is not the taking of collateral security, within the meaning of the statute, and will not divest a mechanic's lien, unless the lien-holder evinces the intention to rely upon the new security rather than upon the lien.

§ 134. *A mechanic's lien is not waived by taking a security upon the same property, unless it is shown that the party intended to rely upon such collateral security.*

The rule to be deduced from these authorities is, that the holder of a claim for labor or materials for a building, erection or improvement upon land does

not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien. If, therefore, in the present case it is made to appear, either that the security afforded by the twenty Pacific division bonds was not upon the same property sought to be subjected to the mechanic's lien, or that the complainants intended to and did rely upon the collateral security afforded by said bonds, in either case the mechanic's lien is waived.

There is testimony tending strongly to show that the complainants did intend to rely upon the security of said bonds, as, for example, the fact that they claimed under the bonds in the foreclosure suit, and received their proceeds in the form of stock in the new company under the decree of foreclosure. But, without dwelling upon this feature of the case, let us inquire whether the security taken was in fact upon the identical property which might have been held by the mechanic's lien.

It appears in evidence that the twenty bonds here referred to were secured by mortgage upon only a part of the railway, to wit: That part known and designated as the Pacific division, being one of four divisions into which the entire railway was divided, and on each of which there was a separate mortgage. Now it does not appear upon what part of the lines the material furnished by complainants herein was used. It certainly cannot be claimed under the evidence that it was all used upon the Pacific division. No such claim is made. On the contrary, the complainants admit that they are unable to show into what part of the lines their material went, and they therefore claim a lien upon all the lines now run and operated by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, including not only the Pacific division but the main line, the Milwaukee extension and the Muscatine division. It is manifest, therefore, that the security afforded by the twenty bonds of the Pacific division, secured as they were by mortgage upon that division alone, was not a security upon the identical property against which a lien is claimed.

But again, the statute provides for a mechanic's lien upon "the building, erection or other improvement, including any work of internal improvement." I suppose it would not be contended that under this statute the complainants could enforce a lien as against the rolling stock of the railway for materials furnished or used in the construction of the roadway, and no part of which was used in the construction or repair of such rolling stock.

It has been held by the supreme court of Iowa in the case of *Neilson et al. v. The Iowa Eastern R'y Co.*, 41 Ia., 184, that the rolling stock of a railroad does not constitute a part of its real estate, and that a mechanic's lien upon a railroad does not embrace such property. If this be a true construction of the statute (and it is at all events a rule of decision for us), it still further illustrates the correctness of the proposition above stated, to wit: That the mortgage bonds, taken as collateral security, are a lien on different property from that upon which the complainants might have asserted their mechanic's lien, for the mortgage securing the bonds covers and includes, so far as the Pacific division is concerned, "all the franchises, fuel, rolling stock, cars, engines, machinery and appurtenances appertaining or belonging to said Pacific division," as well as coal stations, land stations, engine houses and other buildings.

It is quite apparent that a large proportion at least of the property here

enumerated would not be subject to a mechanic's lien for iron and other materials used in the construction of the track. We think it therefore quite clear that the taking of the bonds in question as collateral security was not equivalent to taking security upon the identical property upon which a mechanic's lien is sought to be enforced.

§ 135. *A purchaser at a foreclosure sale is not bound to take notice of a mechanic's lien on the railroad.*

The second question is whether it appears from the evidence that the purchaser at the foreclosure sale, the Burlington, Cedar Rapids & Northern Railway Company, had notice that the complainants claimed a mechanic's lien upon the road. They certainly had notice that the complainants held a claim against the old company, and that they were seeking to enforce it as against the earnings of the road in the hands of the receiver under their bill of intervention in the foreclosure cases, but I see nothing in the record of the foreclosure cases which would charge a purchaser at that sale with notice of a mechanic's lien, claimed or to be claimed by these complainants.

They certainly did not claim any such lien in their intervening petition, and in the agreed statement of facts filed in the foreclosure cases it is distinctly stated, not only that the Pacific division bonds above referred to have been taken as collateral security, but also that "no mechanic's lien is claimed." Counsel insist that this was simply an admission of what was apparent without it, that no mechanic's lien was claimed in that case. Even if we admit this, how can it be claimed that the filing of a petition claiming payment out of the earnings of the road, together with an admission that no mechanic's lien was claimed, was sufficient to give to the purchaser at the foreclosure sale notice that a mechanic's lien would or might be claimed? To give the record this construction would be to require the purchaser at the sale to anticipate that the claimants would fail in the end to secure their claim out of the earnings of the road, and would thereupon take measures to enforce their claim, or a part of it, under the mechanic's lien law.

I do not think that the purchaser was bound to anticipate all this. He was not bound to look beyond what appears upon the face of the record, and nothing appears there indicating any purpose on the part of the intervenors in that case to claim anything more than that which was claimed by them in their intervening petition. I think it fair to say that the purchaser was authorized to assume that the claim of the intervenors was fully and completely set forth by them. Without considering any of the other questions discussed by counsel, these considerations lead to the conclusion that the complainants are not entitled to a mechanic's lien as prayed. The bill must therefore be dismissed.

GRANT v. STRONG.

(18 Wallace, 623-626. 1873.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Strong agreed in writing to do the brickwork on sixteen houses which Grant was building, and to take one of the houses in payment for his work. A deed was executed and placed in escrow, to be delivered when the work was done. Subsequently a new agreement was made, changing the price, but referring to the first agreement for the mode of measurement. It was also provided that the work was to be paid for in Grant's negotiable note, payable within three months from the completion of the work,

and that then the first agreement should be of no effect, and the escrow should be delivered up.

Opinion by MR. JUSTICE MILLER.

We have much argument in the case as to the effect of the note as a negotiable security operating as a release of the mechanic's lien. We think this has but little pertinency to the case. We admit that when a lien has once attached, the taking of such a note does not of itself operate as a release. The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances. In the case before us, much conflicting testimony as to what was said and done by the parties is found in the record. We need not consider this, for in our view the decision of the case must rest on the written agreements we have mentioned, and from them we are forced to the conclusion that the appellee always relied wholly upon other security than a mechanic's lien for his pay, which he deemed sufficient, and which he voluntarily agreed to surrender.

§ 136. *Where a party for work done takes a real estate security, no mechanic's lien attaches, even if he afterwards surrenders that security and takes a note.*

It is very clear that under the first contract, the one under which the larger part of the work was done, he was to take his pay, not in money, but in the lot on which one of the houses was built; and that to secure the completion by Grant of the sale when the work was done, the deed was made and placed in the hands of Totten. Under these circumstances no lien could accrue for the work on that or on the other buildings. When the second contract of November 27th was made, Strong did not give up this security, but still retained and relied on it, and it was made a part of the new contract, that the escrow should remain in the hands of Totten, and should be in full force until the work was completed, measured, and the sum due on it paid by the promissory note of Grant. Now with this security in Totten's hands during all the time the work was going on, looked to and relied upon by Strong, how can it be said that Strong relied upon a mechanic's lien, or that Grant intended in addition to that deed for one lot to allow Strong to obtain a lien upon all the others? And so much reliance was placed on this escrow by Strong, that only after all was settled, the work measured and paid for, as the parties had stipulated by Grant's note, did Strong sign the order for the delivery to Grant of the deed. During this time all the facts repel the idea of a lien.

We do not think that the giving up of the escrow, and the taking of the note in its place according to the terms of an agreement previously made, and which obviously did not look to a mechanic's lien as part of the transaction, would create a lien where none existed before. In short, we are of opinion that these agreements show an acceptance and reliance by Strong on another and very different security for the payment for his work inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case. Decree reversed, with directions to dismiss the bill.

MR. JUSTICE SWAYNE dissented.

McMURRAY v. BROWN.

(1 Otto, 257-267. 1875.)

APPEAL from the Supreme Court of the District of Columbia

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— Mechanics or other persons, who, by virtue of *any contract* with the owner of any building, or with the agent of such owner, have, since the 2d of February, 1859, performed labor, exceeding the value of \$20, upon such building, or have furnished materials, engine or machinery exceeding that value for the construction or repairing of such building, shall, upon filing the notice prescribed in the second section of the lien act of that date, have a lien upon such building and the lot of ground upon which the same is situated, for such labor done or materials, engine or machinery furnished. 11 Stat., 376. Building materials of great value, such as bricks and lumber, were furnished by the complainant to the first-named respondent by virtue of a verbal agreement, as he alleges, between him and the husband of the respondent, acting as her agent.

Service was made and the respondent appeared, and by her answer admitted the averments of the first, second, fourth and seventh paragraphs of the bill of complaint, but denied every other material allegation which it contains. Proofs were taken; and the parties have been fully heard, the judge at special term, entered a decree that the complainant recover of the respondent the sum of \$1,230.62, with interest, as therein provided; and that the described real estate,— to wit, lots numbered 36 and 37, — together with the buildings and improvements thereon, be, and hereby are, subjected to the satisfaction of the complainant's demand. Due appeal was taken by the respondent to the general term, where the decree of the special term was in all things affirmed; and the respondent appealed to this court.

Two other persons were named as respondents in the bill of complaint who never filed any answer, and are not parties to the decree, for the reason that no relief is sought against them, they having been joined as respondents merely for the purpose of discovery in respect to a prior lien held on the premises by the one named as trustee, to secure a debt due to the other. Seasonable appearance was entered by the respondent and she filed an answer; but, the answer having been lost, it is stipulated and agreed between the parties, that the answer, as before stated, admitted all the averments of the first, second, fourth and seventh paragraphs of the bill of complaint, and that it denied every other allegation of the complainant.

Lumber and bricks were furnished by the complainant for two houses; and the evidence shows that the respondent owned both lots on which the houses were being constructed, and that she was represented throughout the transaction by her husband, who acted as her agent in constructing the houses. Nothing further need be remarked respecting the deed of trust of prior date, as it is admitted by stipulation that the deed is canceled, and that the debt secured by it is discharged.

Due notice of the intention of the complainant to hold a lien upon the property, as required by the act of congress, is admitted by the answer; nor is it necessary to discuss the question as to the agency of her husband in the transaction, as that also is admitted by the respondent. What the respondent denies is, that either she, or her agent in her behalf, ever made any such contract with the complainant as that set forth in the bill of complaint, or that

the complainant ever furnished and delivered to her or her agent the building materials specified in the bill of particulars annexed to the bill of complaint, or that the materials were ever used by her or by her authority in the construction of the said houses.

Lots 36 and 37 belonged to the respondent, and the proof is that they adjoin each other. Prior to the alleged agreement with the complainant, the respondent entered into a contract with another party to build a two-story brick house for her on the lot first named, the contractor agreeing to build the house and furnish, at his own proper cost and expense, all the materials necessary to complete the same in a workmanlike manner, for which the respondent agreed to pay to the contractor the sum of \$1,000, and at the same time to convey to him lot 37, and to pay the balance, amounting to \$1,200, in notes of \$50 each, payable monthly, at eight per cent. interest, to be secured by a deed of trust on lot 36, and the house to be built by the contractor, subject to a prior deed of trust on the same lot. By the record, it appears that the contract, though it bears date the 6th of June, 1871, was not actually executed until about the middle of July following, and that the contractor failed to fulfill the stipulations of the written contract.

Perkins, the contractor, was without means or credit, and possessed no capital whatever, except his skill as a builder; and the husband of the respondent, though he controlled the real estate standing in the name of his wife, was without any ready means at his command; consequently the materials for completing the house could not be obtained except by exchanging some of the real estate for the same. Detailed account is given in the testimony of the measures adopted by the parties to effect such an exchange of real estate for building materials; but it must suffice to say that all of the negotiations failed.

All of these attempts to procure building materials by exchanging real estate for the same took place before the contract for building the house was signed; and, at the close of those attempts, an interview occurred between the contractor under the written agreement and the complainant, when the latter informed the former that he would furnish lumber and bricks in exchange for lot 37, computing the value of the lot at forty-five cents per foot. Within two hours after the conversation, the former contractor reported the same to the husband of the respondent, and told him to have the deed of the lot made directly to the complainant, and proposed, at the same time, to divide between them the five cents per foot advance in price which the seller would receive beyond the consideration promised by the former contractor.

Abundant evidence is given to show that the offer of the complainant to take conveyance of the lot, and furnish the building materials as required, was accepted by the husband of the respondent; and that he, the agent, agreed that the lot should be conveyed to the complainant as proposed.

Pursuant to that arrangement, which appears to have been fairly and understandingly made, the complainant continued to deliver the required building materials; and the conduct of the husband of the respondent throughout the whole period the materials were furnished and delivered shows to the entire satisfaction of the court that the materials were furnished and delivered in pursuance of that understanding, and that he knew that the owner and furnisher of the same was parting with his property in the just and full expectation that the whole passed to the benefit of his wife under that arrangement. Evidence to that effect is found in the testimony of several witnesses;

and it is not going too far to say that there is nothing in the record worthy of credit to contradict that theory.

Part of the building materials furnished by the complainant before he made his contract with the respondent were used by the first contractor in the erection of a house on lot 37, which he designed for himself; but the title and ownership of that lot, as well as lot 36, were in the respondent; and on the 1st of November, 1871, she took actual possession of the lot and the unfinished structure thereon which had been commenced by the former contractor, and ever after continued in the possession and control both of the lot and the building.

Nothing further was ever done by the contractor to complete these houses, and the record shows that the same were completed by another contractor employed by the same agent of the respondent. All of the materials for that purpose were furnished by the complainant; and the record also shows that he furnished all the materials used in constructing and completing both houses, except a small part of the bricks, worth perhaps \$100, which were purchased by the managing agent of the respondent.

Attempt is made by the respondent to controvert the proposition that her agent ever contracted with the complainant to furnish the building materials in question, and to take the conveyance of lot 37 in payment for the same; but the evidence is so full and satisfactory to that effect that it is not deemed necessary to add anything to what has already been remarked upon the subject; nor is it of any importance that she had previously agreed to convey the lot to her former contractor in case he completed the house for her on lot 36, as he had failed to fulfill the contract, and she had dispossessed him of the premises and of the partly-erected house which he had commenced.

Materials for that purpose to a considerable amount had been furnished by the complainant during the progress of the work, while it was under the superintendence of the former contractor; but inasmuch as the title of both lots was all the time in the respondent, and she had lawfully resumed the possession of lot 37 on account of the failure of the contractor to complete the building on the other lot within the prescribed time, it was entirely competent for the respondent to make the new contract with the complainant, which it is proved she did make through her agent; and, having made the same, she is bound by its terms and conditions just the same as if it had been in writing.

Suppose the facts are so; still it is insisted by the respondent, as matter of law, that the complainant is not entitled to the relief he seeks, for the reason that the contract set up by him is a special contract. The theory is, that the materials having been furnished upon the verbal contract set out in the bill of complaint, that he, the complainant, should furnish the materials, and that she, the respondent, should convey lot 37 to him in payment for the same, that that contract creates no lien, as the materials were furnished solely upon the faith of the special agreement; but the record shows that her agent who made the contract persuaded the complainant to wait for the conveyance until all the materials had been furnished, and that he, the agent, then refused to make the conveyance. Instead of doing as he agreed, having received an offer of fifteen cents per foot for the lot more than the complainant was to allow, he, the agent, promised to pay the complainant the money for the materials, but failed to make good his promise in that regard.

Both houses were completed; and the proof is that the complainant furnished all the lumber and nearly all the bricks for the purpose, and that he

has received no payment for the materials. On the other hand it appears that the respondent has sold one of the houses for \$6,000, and that she and her husband were living in the other.

§ 137. *Materials to be paid for by conveyance of a lot; failure to convey; right to a lien.*

Other defenses failing, her proposition now is that where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract *alone* for his security, and that he cannot resort to the remedy which the lien law provides. Support to that proposition cannot be derived from anything contained in the act of congress passed to enforce mechanics' liens, unless the words of the first section of the act are shorn of their usual and ordinary import and signification.

Persons who perform labor upon, or furnish materials, etc., for the construction or repairing of a building, *by virtue of any contract* with the owner of the same, or his agent, have a right to the benefit of the lien if he files the notice prescribed by the second section of the act. Certainly the words *any contract* are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the material-man is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended "to hold a lien under the mechanic's lien law."

Special reference is made by the respondent to two decided cases in Pennsylvania in support of her proposition that the lien law does not extend to special contracts. *Hoatz v. Patterson*, 5 W. & S., 538; *Haley v. Prosser*, 8 id., 133. Unexplained, it may be admitted that those cases do afford support to the proposition that the state lien law to which they refer did not extend to the debt of a material-man, arising from the sale and delivery of building materials, if furnished under a special contract; but those decisions were never satisfactory to the legal profession of that state, and it is believed are not regarded as safe precedents even in the jurisdiction where they were made. Instead of that, the legislature of the state, on the 16th of April, 1860, passed a declaratory law which enacts that the true intent and meaning of the provisions of the prior act extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and that the provisions of the former "act shall be so construed." Since that time it has been held by the courts of that state to the effect that special contracts, as well as implied, are within the true intent and meaning of the original lien law of the state. *Russell v. Bell*, 44 Penn., 36-54; *Reiley v. Ward*, 4 Greene (Ia.), 21.

Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely defined by the contract that neither party is at liberty to claim anything beyond the terms of the contract, if the contract is in all respects fulfilled. Consequently lien laws do not in general create a lien in favor of a material-man who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanic's lien upon the same land for the same debt. *Grant v. Strong*, 18 Wall., 623 (§ 136, *supra*); *Phill. on Mech. Liens*, sec. 117.

Such a security is regarded as inconsistent with the intent of the parties that

a mechanic's lien should be claimed by the party furnishing building materials, as the owner may obligate himself to pay in money, land or any specific article of property; but, if he does not fulfill his contract by paying in the manner stipulated, the mechanic is entitled to his lien. *Reiley v. Ward*, 4 Greene, 22. If the labor has been performed or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice.

Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such a security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has become vested in the premises. Laches in that behalf may impair such a right, and it is one which the claimant may waive. *Phill. on Mech. Liens*, secs. 117, 272.

Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material-man is entitled to the lien which the law affords, provided he gives the required notice within the specified time. 11 Stat., 376; *Phill. on Mech. Liens*, sec. 118. Viewed in any light, it is clear that there is no error in the record.

Decree affirmed.

PHILLIPS v. GILBERT.

(11 Otto, 721-726. 1879.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The controversy in this case is as to the validity of a mechanic's lien claimed by the appellant upon certain houses and lots in the city of Washington. The defendant Gilbert, in August, 1871, was the owner of the lots, and proposed to erect a row of brick buildings thereon, and agreed with the appellant that the latter should find the materials and build the houses (six in number) for the aggregate price of \$32,000, to be paid by instalments as the work progressed. Phillips, the appellant, commenced the houses, and proceeded in their construction until the amount accruing to him was upwards of \$12,000; when, the payments being behind, and certain incumbrances on the property not being lifted, as Gilbert had agreed they should be, he, Phillips, on the 23d of May, 1872, filed a mechanic's lien pursuant to the act of congress then in force. This act, passed February 2, 1859 (11 Stat., 376), declared that any person who should, by virtue of a contract with the owner of any building, perform labor or furnish materials for the construction or repair thereof, should, upon filing the proper notice, have a lien upon the building and the lot upon which it was situated. The notice of lien was required to be filed in the office of the clerk of the district court at any time after the commencement of the building, and within three months after its completion; and the clerk was required to record it. The act declared that such liens should have precedence over all other liens or incumbrances which

attached upon the premises subsequently to the time of giving the notice. For enforcing the lien the act provided a summary action at law and an execution against the premises, with a provision, in the eleventh section, that the defendant might file a written undertaking, with surety to be approved by the court, to the effect that he would pay the judgment that might be recovered, and costs, and thereby release the property from the lien. By a subsequent act, passed February 23, 1867 (14 Stat., 403), it was declared that the proceeding to enforce any lien should be by bill or petition in equity, and that the decree, besides subjecting the thing upon which the lien had attached to the satisfaction of the plaintiff's demand against the defendant, should adjudge that the plaintiff recover his demand against the defendant, and have execution as at law.

The bill was filed under this act on the 11th of June, 1873, and set forth the original contract, the performance of the work to the amount (as alleged) of \$16,000, of which \$5,000 was claimed to be unpaid, the filing and recording of the lien; and the further facts that Gilbert had executed certain deeds of trust on the property to secure certain loans specified in the bill, and that on the 16th day of December, 1872, he had conveyed the entire property to the defendants, Boughton & Moore, and that on the 1st of February, 1873, Boughton & Moore executed six deeds of trust, one on each house and lot, to trustees, to secure six certain notes payable to the defendant, the Connecticut General Life Insurance Company, and prayed an account and a sale of the property, payment, and general relief. The defendants were Gilbert, Boughton & Moore, The Connecticut Insurance Company, and the trustees in the several deeds of trust.

On the 25th of June, 1873, the defendants filed an undertaking entered into by Gilbert, Boughton, Moore, J. G. Bigelow, and one W. J. Murtagh; Bigelow being, as it appears, the agent of the Connecticut Insurance Company in effecting the loan for which the six last deeds of trust mentioned in the bill were given as security. The substance of this undertaking was that the undertakers would pay any judgment that might be rendered (including costs) upon or on account of the claim for lien made by the complainant. No further notice of this undertaking seems to have been taken in the proceedings.

Boughton & Moore demurred to the bill, mainly on the ground that the claim for lien was void because made in gross upon six separate lots, without specifically setting forth the amount claimed upon each. Gilbert filed an answer averring that the complainant had been fully paid for all materials and work furnished by him, and the Connecticut Insurance Company filed a separate answer setting up their loan upon the property, the amount of which they stated to be \$36,000; and alleging that, when they made this loan, Phillips, the complainant, executed and delivered to them a release of the lots from the effect and operation of his lien; and that upon the faith of this release they made the loan to Boughton & Moore; and they insisted that the complainant was estopped from proceeding on his claim for lien. They further stated that the release, together with the abstract of title with which it was placed, had been lost or mislaid; and they annexed to their answer a paper which they averred to be a substantial copy of said release. This answer was verified by the affidavit of Bigelow. The alleged copy of release was dated January 10, 1873, and purported to be directed to the clerk of the circuit court, requesting him to release the property in question from the mechanic's lien filed by Phillips on the 23d day of May, 1872. Thereupon Gilbert filed

an amendment to his answer, alleging that he was informed and believed that such a release had been made by the complainant. Replications being duly filed, the parties went into proofs.

On the 30th of March, 1874, an issue was directed to be tried by a jury to ascertain whether Gilbert was indebted to Phillips for work and materials in the construction of the buildings in question; and if indebted, how much, after deducting all payments and set-offs. Upon this issue, the jury, on the 14th of June, 1875, found that Gilbert was indebted to Phillips for the cause aforesaid, after deductions, in the sum of \$4,020. Upon a final hearing upon the pleadings and proofs the bill was dismissed and Phillips appealed here.

Besides the question of indebtedness the principal contest upon the proofs was whether Phillips had executed a release as set up in the answer of the insurance company, so as to estop him from claiming any lien upon the premises. That he did execute some paper of the kind was admitted by himself when examined as a witness; but his allegation is that he had bid off the property at a trustee's sale in November, 1872, and that the paper executed by him was given to Bigelow, the company's agent, for the purpose of raising a loan to himself; but that another arrangement was made whereby he gave up his bid, and never received a deed for the property, and abandoned his application for the proposed loan; and that Gilbert induced Boughton & Moore to purchase the property, and the loan was made by the insurance company to Boughton & Moore; and he, Phillips, was induced to go on with the building of the houses for them on the same terms upon which he had engaged to do it for Gilbert, but upon the distinct understanding that the amount due him, and for which he held his lien, should be paid out of the moneys received from the insurance company; that he never intended to give up his lien unless he had got the loan himself or was paid the amount due him.

§ 138. *A mechanic's lien on a lot of houses is not lost because he files his notice for all of them together, not for each one separately.*

Without going into an examination of the testimony on this subject, it is sufficient to say that we have come to the conclusion that the facts were substantially as contended by Phillips, and that the agent of the insurance company knew perfectly well that Phillips never intended to give up his lien after his negotiation for a loan fell through. We are, therefore, of opinion that he was not estopped by the paper referred to, which seems to have unaccountably disappeared and the contents and date of which are not clearly proved.

We are satisfied, therefore, that when this suit was commenced the complainant's lien was good against the property for the amount found by the jury to be due to him, unless it was void for the reason stated in the demurrer of Boughton & Moore; namely, its being claimed on the whole row of buildings and not on the buildings separately. We think, however, there is nothing in this objection. The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building within the meaning of the law, from having been united by the parties in one contract as one general piece of work. We are clear, therefore, that a decree ought to be entered in favor of the complainant against Gilbert personally for the amount found to be due to him, with interest from the date of the verdict.

§ 139. *The security given against a mechanic's lien releases the property, but the sureties are not liable to a decree in equity, only to a judgment at law on their bond.*

The effect of the undertaking filed in the suit was to release the property

from the lien and to oblige the complainant to have recourse for security of payment to the parties who entered into said undertaking. It would facilitate the ends of justice if a decree could be made at once against the undertakers as is done against stipulators in admiralty proceedings. But we find no precedent for such a course upon a bond or undertaking given by way of indemnity in proceedings at common law or in chancery, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance, which is matter of record.

Our conclusion, therefore, is, that the decree of the supreme court of the district must be reversed and the cause remanded with instructions to enter a personal decree in favor of the complainant against the defendant Gilbert for the amount of \$4,020, with interest and costs; and that execution issue thereon; and further, to decree that the lien claimed by the complainant was a valid lien at the commencement of this suit; but that, by reason of the undertaking filed in the cause, the buildings and lots mentioned in the pleadings became released and discharged from the lien; and that the complainant have leave to proceed at once upon said undertaking in an action of law to be brought for that purpose; also, that the complainant have a decree for the costs against the defendants Gilbert, Boughton & Moore, and the Connecticut General Life Insurance Company of Hartford; and it is so ordered.

§ 140. Who entitled to lien.—One employed by a corporation at a salary, to superintend the construction of buildings and working of mines, stands, as agent, in place of the corporation itself, and is not entitled under the laws of Montana (Cod. Stats., p. 511, sec. 10) to a mechanic's lien for his salary. As to whether a joint lien upon separate and distinct parcels of property is valid, *quære*. *Smallhouse v. Kentucky & M. G. & S. M. Co.*,* 2 Mont. T'y, 443.

§ 141. Under the laws of Oregon which provide "that all persons performing labor for the construction of any building shall have a lien thereon," *held*, that a mechanic who performed manual labor and also acted as overseer in the erection of a building had a lien thereon for his entire compensation. *Willamette Falls, etc., Co. v. Remick*,* 1 Or., 169.

§ 142. Under laws allowing a lien for labor performed upon any building, *held*, that a mechanic who worked upon a dam or breakwater, attached to, and for the use of certain mills, had a lien upon such mills for the value of his services. *Ibid*.

§ 143. Under the statutes of Utah Territory (Acts of 1889, p. 8) providing that "any person may avail himself of the provisions of this act" (mechanic's lien law) "whether his claims be due or not, by filing in the recorder's office . . . at any time within three months after the labor performed or material furnished, or after the completion of such building, a notice of his intention to hold a lien upon such building," etc., *held*, that any one furnishing materials for, or any one performing labor on, a building, is entitled to file his notice of lien at any time within three months after the completion of the building. *Eclipse M'fg Co. v. Nichols*,* 1 Utah T'y, 252.

§ 144. A party is not estopped to set up against a railway company a mechanic's lien for work or labor performed, to the detriment of bondholders, because he was a stockholder of a construction company which placed the bonds on the market and gave a guaranty that the local subscription and grants should be sufficient to prepare the road for the reception of the rails and undertook to make good any deficiency in such local aid. *Meyer v. Hornby**, 11 Otto, 728.

§ 145. A subcontractor furnishing labor or materials for the construction of a building cannot maintain a lien for the value of such labor or material furnished, under the act of the Colorado legislature of 1872, unless at the time of giving notice of such lien to the owner of the building, there was a balance due from the owner to the original contractor. Nor shall the lien exceed in amount the balance due at the time of such notice. *Jensen v. Brown*,* 2 Colo. T'y, 694.

§ 146. Lien relates back — Mortgages — Priority.— Under the code of Iowa (section 2189), mechanics have a lien upon railways for work done thereon, and where there was no recorded lien or incumbrance at the time of the commencement of the building or railway, the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done, or his materials were furnished, after a mortgage

was recorded or lien created. *Taylor v. Burlington, Cedar Rapids & Minnesota R. Co.*, 4 Cent. L. J., 536; 11 West. Jur., 337. See §§ 126-32.

§ 147. Under the Iowa code (section 2141), a mechanic's lien on buildings erected on land already incumbered by a mortgage takes priority as to the buildings over the mortgage, but as to the land the mortgage retains its priority. *Ibid.*

§ 148. But where a prior mortgage attaches not only to the land, but to a completed house or other erection thereon, or to a railroad, and a mechanic subsequently does work or furnishes materials in repairing such building or railway, he has a lien, but a lien subordinate to the mortgage, and which must be enforced as such. *Ibid.*

§ 149. A mechanic's lien does not take priority over a mortgage recorded before the filing of the lien. *Moran v. Schnugg*, 7 Ben., 399.

§ 150. Under the statutes of Oregon (p. 150, sec. 7), the liens of different mechanics engaged in the construction of a building stand on an equal footing, and relate back to the commencement of such building. *Willamette, etc., Co. v. Riley*,* 1 Or., 183.

§ 151. Under the territorial act of December 30, 1864, "securing liens to mechanics and others," preference is given to liens of mechanics and material-men over mortgages or other incumbrances made subsequent to the commencement of the building. *Mason v. Germaine*,* 1 Mont. T'y, 263.

§ 152. Under the statute of Montana Territory, a mechanic's lien exists independent of the possession of the property, is a charge upon the property in the hands of the owner, and when it once attaches, it relates back to and takes effect from the commencement of the labor or appropriation. *Mochon v. Sullivan*,* 1 Mont. T'y, 470.

§ 153. In Texas, mechanics' liens for work done or materials furnished in repairing or extending a railroad do not attach so as to take priority over a mortgage existing on such railroad before such repairs or extension. *Galveston Railroad v. Cowdrey*, 11 Wall., 459.

§ 154. The lien which a builder in Washington has under the act of Maryland, 1791, chapter 45, section 10, is a remedy *in rem* only and not *in personam*. *Homans v. Coombe*, 3 Cr. C. C., 365.

§ 155. The lien commences with the recording of the contract for building, and does not overreach the lien created by a deed of trust made prior to the recording of the contract. *Ibid.*

§ 156. Under the act of February 2, 1859 (11 Stat. at Large, p. 376), which provides "that the liens created in pursuance of the provisions of this act shall have precedence over all other liens or incumbrances which have attached upon the premises subsequent to the time at which said notice was given," held, that a contractor who filed his notice of intention to claim a lien within three months after the completion of the work, did not obtain thereby, through the principle of relation, a lien from the time when he commenced the building, as against an intermediate purchaser; that the lien is not to take effect except upon filing the notice, and that the fact that the mechanic is openly doing the work is not notice to any one, not being made so by statute. *Cotton v. Holden*,* 1 MacArth., 463.

§ 157. In 1843 the legislature of Pennsylvania passed a joint resolution to the effect that no corporation constructing, making or managing any railroad, canal or other public improvement should make any conveyance, mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay debts to contractors, laborers and workmen employed in the construction or repair of said improvement. While this resolution was in force, in 1853, the Hemphill Railroad Company entered into a contract with one Fox to do work on the road, which he did. On February 16, 1855, said Fox brought suit in the circuit court of the United States at Pittsburg against the company, and on November 23, 1860, obtained judgment for \$33,500. This judgment by the law of Pennsylvania constituted a lien against the company's real estate for five years and no longer. And the law of the state required notice to be given to terre-tenants, when there are terre-tenants, to revive the judgment against them. On June 27, 1855, the company executed a mortgage on their road, franchises, etc., to one Seal, as trustee, to secure bonds to the amount of \$1,000,000, which was afterwards foreclosed, Fox applying in vain to be allowed to intervene *pro interesse suo*, or if this should not be granted, to be paid out of the proceeds of sale. Sale of the road under the decree was made to the Pittsburg, Wheeling & Baltimore Railroad Company on March 30, 1871. On January 29, 1867, Fox had issued a *scire facias* against the Hemphill Railroad Company to revive the judgment against said road, the lien of which had expired in 1865. Judgment was entered on this *scire facias* March 14, 1867. On April 4, 1862, the legislature of Pennsylvania passed an act providing that any contractor, laborer or workman who had obtained a judgment against any incorporated company, subject to the provisions of the resolution of 1843, might issue a *scire facias* upon said judgment with notice to any person or company claiming to hold or own said real or personal estate, etc., the case to proceed as in other cases of *scire facias* against terre-tenants. On February 23, 1871, Fox issued a *scire facias* to revive

judgment, on judgment obtained in 1867, and made Seal a co-defendant with the original defendant, and after sale of the road brought in the Wheeling, Pittsburg & Baltimore Railroad Company as another co-defendant, and judgment having been given for the defendants, the plaintiff brought the case here. *Held*, that under the joint resolution of 1843, the plaintiff had a lien of indefinite duration. That neither the mortgage itself nor any sale under it could defeat, postpone, endanger or delay the lien of said contractor. That the judgment on said lien did not extinguish his rights under said lien, and that said lien was not merged in the judgment. That terre-tenants against whom it was necessary that a *scire facias* to revive a judgment to preserve a lien should be sued out, are those having seizin, owners, or those claiming to be owners, of title derived from the defendants, and that the trustees were not terre-tenants, and that to enable a contractor to proceed by *scire facias* under the act of 1862 it was not required that his judgment should be a lien. *Fox v. Seal*,* 23 Wall., 424.

§ 158. A mechanic's lien, under chapter 158 of the Revised Statutes of Wisconsin, attaches from the time the building was commenced upon which the work was done or material used. *In re Cook*,* 3 Biss., 116.

§ 159. Under the mechanic's lien law of Montana Territory a mechanic's lien has precedence over all other incumbrances put upon the property after the commencement of the building. *Davis v. Bilsland*,* 18 Wall., 659.

§ 160. When parties who claim mechanics' liens upon certain real estate of a bankrupt in New Jersey for work done and materials furnished prior to the adjudication in bankruptcy have, after such adjudication, and within one year after the performance of the labor and the furnishing of the materials, filed their claims in the office of the clerk of the county, the law gives them liens to secure such debts *eo instanti* they were incurred; the adjudication in bankruptcy before the claims filed and within the year, could not defeat the liens, and such liens took precedence of mortgages or incumbrances created after the commencement of the building. *In re Dey*,* 9 Blatch., 285.

§ 161. Taking security.—Where a state law gives material-men a lien on ships and vessels, such lien is lost where the circumstances show no intention to rely upon the lien. A furnished materials to B., who was building a ship for C., and other vessels for other parties. The account of the lumber, etc., furnished was kept without reference to the amount that went into each individual vessel. Payments were made by B. from time to time, A. making no appropriation on his books to any items to distinguish his claim upon the different vessels. Credit was also given B. for four months, which would carry the day of payment beyond the duration of the lien given by statute. *Held*, that personal credit was given to B. and the lien waived as against the claim of the owners. *Gardiner v. Pearson*,* 7 Law Rep. (N. S.), 322.

§ 162. An agreement under the laws of Iowa, by the debtor, to pay out of a specific fund, does not, as collateral security, vitiate the creditor's mechanic's lien. So held where a contract between a railroad company and a construction company stipulated that the former should pay the latter out of the subscription fund of a certain county along the line. (Removal Cases.) *Meyer v. Construction Company*, 10 Otto, 457.

§ 163. Under the Pennsylvania statute of June 13, 1836, giving to mechanics a lien for work done to vessels, the lien is not necessarily discharged by the party's taking a note and giving a receipt in full. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction. *Sutton v. The Albatross*, 2 Wall. Jr., 327.

§ 164. Filing account.—Where A. entered into a contract with H. to work for \$2,500 per year, and continued to work for twenty-one months, *held*, under the Montana statutes requiring the person claiming a lien to file an account of his demand within sixty days after the labor had been performed, that A. was not required to file his account within sixty days after the end of the first year, in order to secure a lien for the first year's wages. *Alvord v. Hendrie*,* 2 Mont. T'y, 115.

§ 165. Under the law of New Jersey a mechanic's lien does not attach until it has been filed in pursuance of the statute of that state. In the Matter of Dey, 3 Ben., 450.

§ 166. Under the territorial act of December 30, 1864, "securing liens to mechanics and others," the words "just and true account" do not necessarily mean the exact amount a court or jury may find due under the contract, but an honest statement of the account by the party who claims the lien. *Black v. Appolonio*,* 1 Mont. T'y, 342.

§ 167. The fact that a party in his complaint and notice of lien claimed a larger amount as his due than that found by the court will not destroy his lien for the amount actually due, unless there be a fraudulent intent in filing the same. *Mason v. Germaine*,* 1 Mont. T'y, 368; *Black v. Appolonio*,* 1 Mont. T'y, 342.

§ 168. Under the mechanic's lien law of Pennsylvania, the claim must be filed within six months after the work has been done or materials furnished. In computing the time, either

the day on which the last work is done, or the day on which the claim is filed, must be excluded. *In re Martin*,* 4 Fed. R., 208.

§ 169. Materials were furnished on the 19th day of May, 1877, and the account and claim of lien were not filed till the 24th of November, 1877. Under the law of Virginia, *held*, that this was too late. *Stewart v. Gogorza*,* 8 Hughes, 459.

§ 170. Suits—Limitations.—Under the Oregon mechanic's lien law of 1851, suits for materials furnished must be brought within one year. *Willamette Falls, etc., Co. v. Perrin*,* 1 Or., 182.

§ 171. No debt for materials furnished for building a house in Washington, Alexandria, or Georgetown, District of Columbia, will, under the act of congress of 2d March, 1833, remain a lien upon the house for more than two years from the commencement of the building, unless an action for the recovery of the debt be instituted, or the claim filed within three months after furnishing the materials. *Waller v. Dyer*, 5 Cr. C. Ct., 571.

§ 172. A person furnishing materials and labor in the erection of a building in the city of Washington, in the District of Columbia, cannot claim the benefit of the lien given by the act of congress of the 2d of March, 1833, chapter 79, after the expiration of two years from the commencement of the building, unless an action shall have been instituted or the claim filed in the clerk's office within three months after performing the work and furnishing the materials. *McClellan v. Withers*, 4 Cr. C. Ct., 668.

§ 173. Under the statute of California, giving a lien to "persons performing labor or furnishing materials for the construction or repairs of" ditches, flumes or aqueducts, etc., provided "that no lien shall continue for a longer period than one year after the work is done or materials furnished, unless suit be brought in a proper court to enforce the same within that time," the work of the contractors being continued to June 13, 1853, and the suit being filed on June 12, 1854, *held*, that the suit was brought within the time prescribed. *Canal Company v. Gordon*,* 6 Wall., 561.

§ 174. Machinery and fixtures.—Under the laws of Connecticut, a mechanic's lien is confined to the buildings, and is for work and materials bestowed on them. It does not include machinery or fixtures not necessarily connected with and forming part of the buildings, nor fences or blocks, or timber for trip-hammers or any other frame work or supports for machinery which can be put in or taken out without disturbing the buildings. *Beers v. Knapp*,* 5 Bn., 101.

§ 175. On vessels.—Plaintiffs claim a mechanic's lien upon certain vessels on the stocks which were being built by one Beach for the defendants. *Held*, that the law of Virginia did not give a lien upon a ship on the stocks. *Stewart v. Gogorza*,* 8 Hughes, 459.

§ 176. Lumber and timber were furnished to a ship-builder, who was at liberty, under his engagement with the material-men, to put their stuff into any of the vessels he was constructing, or to sell it, or to ship it off without using it. The mere casual mention of his intention to use the lumber in two brigs when ordering it, without any stipulation to that effect, could not bind the owner of the vessels, hundreds of miles distant, and even if under the laws of Virginia there could under any circumstances be a mechanic's lien against a vessel on the stocks, there could be none in such a case. *Ibid*.

§ 177. Public property—Sureties.—In Missouri there is no mechanic's lien on a public school building. So when a party had entered into a contract for the building of a public school-house for \$15,000 within a specified time, and the defendant was his surety, and the question arising whether the surety could be charged as liable upon his contract of suretyship, for certain claims of mechanics' liens against the public school building upon which suits were brought (the surety not being a party), and in which judgments were rendered against the school board and the principal contractor, establishing these liens to an amount exceeding the \$15,000 for which the building was to have been constructed and completed, it was held that the surety could only be liable upon the ground that the claims were valid mechanics' liens, and that as the question had never been raised where he was a party, he could raise the question in the suit against him; and it was further held that the claims were not valid liens. *State of Missouri v. Tiedermann*,* 3 McC., 399; 10 Fed. R., 20.

§ 178. Attaches to whole of railroad.—The lien of a contractor for work done on a part of a railroad attaches to the whole of the road. The fact that it was agreed that the court should limit it to said part can do appellants, who were mortgagees of the road, no harm. *Meyer v. Hornby*,* 11 Otto, 728.

§ 179. Bankruptcy.—Under the act of Oregon (Or. Code, p. 763) giving a lien to mechanics and material-men, the lien attaches from the commencement of the labor or the delivery of the material furnished, and the filing of the notice required is only a condition subsequent, which is necessary to be performed to preserve the lien for a greater period than three months from the completion of the building. The notice merely preserves the lien; it does not create it. Thus where a lien was not filed until after proceedings in bankruptcy had been instituted,

but was filed within the statutory time, *held*, that the trustee in bankruptcy took the property subject to the lien. *In re Coulter*, 2 Saw., 42; 5 N. B. R., 64.

§ 180. In order to continue a mechanic's lien, notwithstanding the commencement or pendency of bankruptcy proceedings, the holder may, by leave of the United States district court, file a petition in the clerk's office of the state court, or ask to have his rights established in the United States court. To file such a petition in the state court, without leave of the United States district court, is a contempt of said court. *In re Cook*, * 3 Biss., 116.

§ 181. A mechanic's lien is only enforceable to the extent of the value of the materials used, or sold to be used, in the construction of the building. It is not enforceable for work done after the filing of the petition in bankruptcy. *Ibid*.

§ 182. Damages and costs.—Where suit is brought to declare a mechanic's lien, the auditor to whom the cause is referred may allow the defendants damages sustained by reason of the failure of the plaintiff to complete the building within the time prescribed by his contract; also damages to which they are entitled for the unworkmanlike manner in which the work was done on said building by the plaintiff. Costs may also be withheld from the plaintiff in the exercise of an equitable discretion. *Burn v. Whittlesey*, * 2 MacArth., 189.

§ 183. In Montana.—To give a mechanic a lien for labor performed under the statutes of Montana Territory (Cod. Stats., ch. 40), it is not necessary that such labor be performed under any contract. *Alvord v. Hendrie*, * 2 Mont. T'y, 115.

§ 184. Under the territorial act of December 30, 1864, a mechanic can claim a lien for services under an implied contract. *Black v. Appolonio*, * 1 Mont. T'y, 342.

§ 185. Insurable interest.—The holder of a mechanic's lien has an insurable interest in the buildings constructed by him, although, they being covered by a prior mortgage, only the equity of redemption is liable to the lien. This insurable interest is not limited by the amount the equity of redemption would bring at auction sale, but by the value of the property and the amount of his claim. *Insurance Co. v. Stinson*, 13 Otto, 25.

§ 186. Repeal of law.—Where work was begun under a law giving a lien, and before the completion of the building and filing of the lien that law was repealed and another passed extending the time within which the notice of the lien might be filed, *held*, that the lien for work performed under the former law was not lost by the repeal of that law, and that the notice of lien for the entire work might be filed in accordance with the new law. *Willamette Falls Transp., etc., Co. v. Riley*, * 1 Or., 183.

§ 187. What secured.—A mechanic's lien secures no claims for anything but labor or materials furnished in the construction of the building or structure. Claims for ferriage, postage, etc., and similar expenses incurred incidentally cannot be embraced in a judgment for a lien. *Willamette Falls Transp., etc., Co. v. Renuick*, * 1 Or., 169.

§ 188. Notice.—Under the statutes of Oregon, the notice must show the amount of indebtedness claimed or it will not be good. *Willamette Falls Transp., etc., Co. v. Riley*, * 1 Or., 183.

§ 189. Railroads—Receiver.—When a railroad passes into the hands of a receiver pending a foreclosure suit, "back claims" for materials, labor, etc., are not considered as a lien, but will be paid in the equitable discretion of the court. *Turner v. I. B. & W. Ry Co.*, 8 Biss., 315.

§ 190. Release—Loan on property.—Where a mechanic has filed a lien upon a certain piece of property, and then releases it, in order to enable the parties owning the property to make a loan, he can afterward claim no lien as against those who have advanced the money. *Phillips v. Gilbert*, * 2 MacArth., 415.

§ 191. Release—Limitations—Portion of work affected.—A statute of California gives a lien to persons performing labor or furnishing materials for the construction or repairs of ditches, flumes or aqueducts, to create hydraulic power, or for mining purposes, provided that no lien shall continue for more than one year after work done or materials furnished, unless suit be brought in that time. With this statute in force, the South Fork Canal Company, being desirous of having, for mining purposes, a canal or flume from near Placerville to the south fork of the American river, a distance of about twenty-five miles, had constructed a canal from Placerville about half way. In March, 1853, they entered into a contract with Gordon & Kinyon to extend the work from the point mentioned to the river, which new part was divided into sections 17 to 25. By the terms of the contract, the work should be completed by July 1, 1853, the work to be paid for monthly. Under the contract, Gordon & Kinyon worked till June 7, 1853, when, not being paid for work done in May, they gave notice to the company, declaring the contract "annulled and at an end," and they themselves "no longer parties to it," but stated that they would continue the work for six days longer at their own risk, etc. On the 13th of June, not having heard from the company, they withdrew the whole of the former note except that part which declared the contract broken, annulled and ended. On the next day Gordon informed the company in writing, that Kinyon was only interested in the contract to the extent of one-third of the profits, and on June 21st he and Kinyon filed a no-

tice of their claim of a lien on the work known as the South Fork canal. A day or two after the delivery to the company of the note of the 7th, the amount due on the May estimate was tendered to Kinyon but declined. On June 23d, Gordon & Kinyon brought suit to enforce their lien. On the 28th, the company took from Kinyon a release, in the name of Gordon & Kinyon, of all claims, paying Kinyon \$2,000 in money and \$3,000 in the company's stock. Kinyon immediately left the country. On June 12, 1854, Gordon, having discontinued the suit already brought, filed a bill to enforce his lien. In this suit he recovered all that he demanded, except for work preliminary to work done on the canal, which was held by the court not a lien under the statute. And the lien was decreed to extend to the whole canal; and the whole was directed to be sold to satisfy it. On appeal, *held*, that the release by Kinyon being a fraud did not extinguish the lien. That the work of the contractors being continued to June 13, 1853, and the bill being filed on June 12, 1854, the suit was brought within the time prescribed by the statute. That the lien affected only the upper section of the canal upon which the work was done. *Canal Company v. Gordon*,* 6 Wall., 561.

§ 192. Assignment of claim.—After the completion of the contract an assignment of the claim for labor or materials will carry the lien with it. Otherwise, if the contract is not completed. *Mason v. Germaine*,* 1 Mont. T'y, 263.

§ 193. Under the mechanic's lien law of Montana Territory a mechanic who has filed his lien may assign the same, and the assignee may bring suit in his own name. *Davis v. Bilsland*,* 18 Wall., 659.

§ 194. A release obtained by fraud from one of two joint contractors in the name of both does not extinguish a mechanic's lien. *Canal Company v. Gordon*,* 6 Wall., 561.

III. IN EQUITY.

SUMMARY—*Distinct appropriation of fund necessary.* § 195.—*Service by agent beyond terms of authority,* § 196.

§ 195. To create an equitable lien it is indispensable that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it. *Wright v. Ellison*, §§ 197-99.

§ 196. The complainant Wright was employed to prosecute a claim in the courts of Brazil for restitution of a vessel illegally captured and condemned. His efforts having proved ineffectual, he endeavored to induce the government of the United States to demand indemnity for this and other vessels. In this he was successful, indemnity being asked and granted. Such services were not within the terms of his employment (although the letter of attorney was drawn in very general terms), but he sought to maintain an equitable lien upon the fund for his services in procuring the intervention of the government of the United States. *Held*, that he had no lien. *Ibid*.

[NOTES.—See §§ 200-210.]

WRIGHT v. ELLISON.

(1 Wallace, 16-22. 1863.)

STATEMENT OF FACTS.—The complainant, Wright, was employed to prosecute a claim in the courts of Brazil, for restitution of a vessel illegally captured and condemned. His efforts in the courts proved ineffectual, and he then endeavored to induce the government of the United States to demand indemnity for this and other vessels. In this he was successful, indemnity being asked and granted. Such services were not within the terms of his employment (although the letter of attorney was drawn in very general terms), but he sought to maintain an equitable lien upon the fund for his services in procuring the intervention of the government of the United States.

Opinion by MR. JUSTICE SWAYNE.

The determination of the case depends upon the solution of the question whether the complainant has shown himself entitled to an equitable lien upon the fund to which the controversy relates.

The instrument executed by Goodrich, the master of The Caspian, to Zimmerman, Frazier & Co., we think it quite clear, contemplated only judicial

proceedings, and the disposition of the vessel after those proceedings were successful. Zimmerman, Frazier & Co., in substituting the complainant in their place, did not attempt to give, nor could they have given, any greater authority than they themselves were clothed with. The acquiescence of the owners whose rights are here in question may be properly held to have ratified the acts of Goodrich in their behalf, but it cannot be held to enlarge the powers conferred by the instrument which he executed beyond what is expressed, and the objects in the minds of the parties at the time of the transaction.

§ 197. *Where an agent goes beyond the power conferred, and renders services beneficial to his principal, and the principal by his silence approves the act, the agent is entitled to compensation.*

The services of the complainant, in bringing into activity the diplomatic agencies of the United States and otherwise, at Rio, and subsequently in prosecuting the claim in this city, were outside of his original authority. Nevertheless they were beneficial to the claimants, and the approval of the defendants may be fairly implied from their silence and inaction. When the defendant, Ellison, interposed the fruit was ripe and ready to fall into the hands of those entitled to receive it. We regard the case as a proper one for compensation, and in an action at law the complainant could hardly fail to recover.

§ 198. *Right of trial by jury. Supreme court will enforce the right, though no objections are made.*

But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury. The objection is one which, though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce. *Hipp v. Babin*, 19 How., 278 (Eq., §§ 1134-36); *Parker v. Winnipiscogee Co.*, 2 Black, 551 (Eq., §§ 696-98).

§ 199. *An equitable lien can exist only by a distinct appropriation of the fund.*

The evidence in the case is wholly silent as to any agreement touching the compensation of the complainant. It is nowhere intimated what he was to receive, or when or how he was to be paid. No established usage is shown. The matter seems to have been left to rest upon the principle of *quantum meruit*, and to be settled by the agreement of the parties when the business was brought to a close. The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include this case. It is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it. *Morton v. Naylor*, 1 Hill, 583; *Hoyt v. Story*, 3 Barb., 262; *Burn v. Carvalho*, 4 Mylne & Cr., 690; *Watson v. The Duke of Wellington*, 1 Russ. & Myl., 602. This case is wholly wanting in these elements.

Decree affirmed with costs.

§ 200. *In general.*—By the common law, liens exist only in cases where the party entitled thereto has either actual or constructive possession of the goods; but a lien in equity is not a property in the thing, but a charge upon the thing, and exists independently of the possession. *Ex parte Foster*, 2 Story, 131.

§ 201. In courts of equity, the term lien is used as synonymous with a charge or incumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing. *Peck v. Jenness*, 7 How., 612.

§ 202. A court of equity has general jurisdiction of liens, inasmuch as a court of law cannot (except by execution) order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto. *Heine v. Levee Commissioners*, 1 Woods, 246.

§ 203. Equity acknowledges liens which cannot be enforced at law, but an equitable lien, though not necessarily creating a property in the thing, must amount to a charge upon it, in order that it may be recognized and enforced in a court of justice. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212.

§ 204. Whenever parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether owned by the assignor or contractor, or not; or, if personal property, whether it is then in being or not, the contract attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto. *Barnard v. N. & W. R. Co.*, 4 Cliff., 351.

§ 205. Where a lien or equitable claim, constituting a charge *in rem*, is a matter of agreement, it will be enforced in equity, not only upon the real estate, but also upon personal estate, or money in the hands of a third person; and against the party himself, his personal representatives, or persons claiming under him, or assignees in bankruptcy. *Fletcher v. Morey*, 2 Story, 555.

§ 206. An equitable lien is valid, unless the agreement by which it was created be contrary to the laws of the state, although no remedy for its enforcement is provided by the state jurisprudence. *Ibid.*

§ 207. If three persons mortgage their joint property to indemnify the drawer of bills of exchange, drawn for their accommodation, in case of protest; and if each of the mortgagors agrees to take up a third part of the bills upon their return under protest, and if two of them neglect to take up their two-thirds, whereby the other mortgagor is compelled to take up the whole of the bills, in consequence of which he requests the drawer not to release the mortgage, but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged property to the amount of two-thirds of the bills in favor of that mortgagor who took up the whole. *Pratt v. Law*, 9 Cr., 456.

§ 208. A person indebted for taxes on real estate, in Georgetown, District of Columbia, who avails himself of the benefit of the ordinance of June 15, 1822; by giving his notes therefor, creates an equitable lien on the real estate, which holds good as against a subsequent purchaser, the ordinance being sufficient notice to such purchaser. *Corporation of Georgetown v. Smith*, 4 Cr. C. C., 91.

§ 209. A supercargo has an equitable lien on a cargo in his hands as factor, or on the proceeds of such cargo when sold, for a general balance due to him by the owners, notwithstanding their assignment of the cargo and bill of lading to a trustee for the benefit of certain creditors. *Vowell v. West*, 4 Cr. C. C., 100.

§ 210. Advances to a master of a ship seized and carried into France in 1810, and liberated after eighteen months' detention, made after her release, to enable her to prosecute her homeward voyage, are not an equitable lien either upon the ship or upon the compensation awarded to the administrator of the owner, by the commissioners under the French convention. The plaintiff must resort to the administrator of the owner for payment in the ordinary course of administration; especially if the person making the advances takes bills of exchange for the amount advanced, as that would waive the lien if any originally existed. *Mason v. Cutts*, 5 Cr. C. C., 465.

IV. ON RAILROADS.

[See CONVEYANCES, C., XIV.]

SUMMARY — *Loan of state bonds; release of first mortgage; loan by county*, § 211.

§ 211. The Pacific Railroad Company was incorporated by the legislature of Missouri in 1849, with power to construct a line of railway from St. Louis to Kansas City. The state, to aid in the construction of the road, loaned its bonds to the company from time to time, amounting in 1855 to more than \$7,000,000, which were secured by a first mortgage on the property, franchises and income of the company. By an act approved February 10, 1864, the company was authorized to borrow money to complete its road to Kansas City, and for that purpose to issue its bonds to the amount of \$1,500,000, to be secured by a first mortgage on its line west of Dresden, so much of the bonds as were necessary to be applied to the completion of the road to Kansas City, and to no other purpose. For that object, and to that amount and extent only, the state, by the express words of the act relinquished her first mortgage on the road west of Dresden, retaining, however, a second lien and mortgage. The act created the office

of fund commissioner, to continue until the bonds issued for the completion of the road, and the state bonds with interest were paid or exchanged for first mortgage bonds of said road. The fund commissioner was to take possession of the \$1,500,000 bonds, negotiate them and apply their proceeds with the earnings of the road as directed in the act. In 1864, the state of Missouri was invaded by insurrectionary forces which destroyed much of the property of the road, the cost of repairing which was estimated by the board of directors at \$700,000. This amount the board desired the county of St. Louis to provide for by issuing its bonds, bearing seven per cent. interest, the same to be a loan to complete the road, and the memorial of the board communicating the facts to the county concluded as follows: "If completed, we believe that the *earnings* of the road will soon furnish all the equipments required for the increased business, pay off the \$1,500,000 mortgage, provide for the payment of the bonds now asked for, and in six or seven years commence paying on the bonds issued by the state for our benefit." The county court agreed to issue the bonds, and an act of the legislature of Missouri was passed on the 7th of January, 1865, authorizing the county to issue seven hundred bonds of \$1,000 each, etc., "said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued," and directing the fund commissioner, "or such person as may at any time hereafter have the custody of the funds of said railroad company, every month after said bonds are issued," to "pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, \$4,000, and \$1,000 additional in each month of December, to meet the interest on said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad. This act was accepted by the railroad company. It expressly agreed to comply with all its provisions. In conformity therewith the bonds were issued by the county, sold by the company, and the proceeds applied in the completion of the road to Kansas City. On July 15, 1868, the company executed a first mortgage on its franchises and property for \$7,000,000; on July 1, 1871, a second mortgage for \$3,000,000; and on July 10, 1875, a third mortgage for \$4,000,000, the latter being foreclosed by decree on June 6, 1876, and sale ordered, but without prejudice to the lien claim of St. Louis county. *Held*, that the state, by the act of 1865, waived its prior statutory lien to the extent necessary in favor of the county, and that the act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of a particular fund, to wit, the earnings of the road, to continue until the bonds were paid, or the county discharged from liability. That parties claiming under mortgages executed after the act of 1865 (none others being interested in the determination of this case) are chargeable with notice of the appropriation of earnings made by that act, and that the property itself or the funds accruing therefrom by whomsoever held is chargeable with the lien of the county. (JUSTICES STRONG and BRADLEY dissent.) *Ketchum v. St. Louis*, §§ 212-15.

[NOTES.— See §§ 216-223.]

KETCHUM v. ST. LOUIS.

(11 Otto, 306-319. 1879.)

APPEAL FROM U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.— The present appeal brings before us for examination a decree of the circuit court rendered April 25, 1877, adjudging that the county of St. Louis had an equitable lien or charge upon the earnings of the Pacific Railroad of Missouri, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon, to the extent of \$4,000 per month, payable monthly, from the 1st day of April, 1876, and \$1,000 payable in each month of December, to meet the interest upon \$700,000 of bonds issued by the county of St. Louis in the year 1875, and by it loaned to the Pacific Railroad Company, such payments to continue until the bonds are fully paid by the company.

The decree declared the lien to exist, and to be enforceable on the railroad property and franchises, against the funds in the hands of the receiver in this suit as well as the purchaser under the mortgage foreclosure sale to be hereafter referred to. The learned judge who heard this cause in the circuit court

rested the decree upon the proposition of law that "if a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor."

Was there an agreement of the character indicated in this statement? That is the first question to which we shall direct our attention. The Pacific Railroad Company was incorporated by the legislature of Missouri in the year 1849, with power to construct a line of railway from St. Louis to Kansas City, a distance of nearly three hundred miles. For the purpose of aiding in the construction of the road the state from time to time loaned its bonds to the company. They amounted in the year 1855 to more than \$7,000,000, and were secured by a first mortgage upon the property, franchises and income of the company, with power of sale upon default in meeting the interest and principal of the bonds. Less than two hundred miles of the road was completed at the beginning of the recent civil war, and during its continuance but little progress was made in the work of construction.

By an act approved February 10, 1864, the company was authorized to borrow money "for the completion of the main road to Kansas City," and for that purpose to issue its bonds to the amount of \$1,500,000, "to be secured by a first mortgage on the main line of the road west of Dresden,"—so much of the bonds as were necessary to be applied to the completion of the road from its then terminus to Kansas City, and to no other purpose. For that object, and to that amount and extent only, the state, by the express words of the act, relinquished her first mortgage lien and right of forfeiture upon the road west of Dresden, retaining, however, a second lien and mortgage thereon,—such second lien and mortgage to become forthwith, upon the payment in full of the principal and interest of the bonds authorized by that act, the first lien and mortgage, in every respect and as fully as those held by the state.

The act created the office of fund commissioner, to be filled by appointment of the governor, subject to confirmation by the senate. It declared that such office should "continue until the bonds issued for the completion of the road, and the state bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first-mortgage bonds of said road," as thereafter provided. The fund commissioner became entitled, and it was made his duty, to take possession of the \$1,500,000 of bonds authorized to be issued, negotiate the same, and their proceeds, together with the gross earnings of the road, from whatever source, to control and apply as directed in the act.

Without referring to other provisions of the act, it is sufficient to say that the state, through the fund commissioner, acquired, for its security, complete control of the earnings and income arising from the property.

Following the course of events in the history of this railroad, we find that in September, 1864, the state of Missouri was invaded by insurrectionary forces, which destroyed much of the property belonging to the company, including bridges, depots, machine-shops, and track. The cost of repairing the injury thus done and of completing and putting the road in successful operation was estimated by the board of directors at the sum of \$700,000. These facts were communicated to the county court of St. Louis county by a committee of the board, in a memorial, stating: "This sum we have lost as the

result of the invasion. This amount we want the county to provide by issuing to the company the bonds of the county (under authority to be given by the legislature), bearing seven per cent. interest, the same to be a *loan* to complete the road, the company to refund to the county the principal and interest as the same matures."

The memorial concluded in these words: "If completed, we believe that the *earnings* of the road will soon furnish all the equipments required for the increased business, pay off the \$1,500,000 mortgage, provide for the payment of the county bonds now asked for, and in six or seven years commence paying on the bonds issued by the state for our benefit. But should the financial success of the enterprise not equal our expectations, the importance of the road as a great artery of trade and commerce will justify the expenditure asked for."

The justices composing the county court seem to have concurred in the propriety of the loan, but differed as to the conditions upon which it should be made. One of their number presented for adoption an order reciting the conditions which, in his judgment, should be embodied in any law authorizing bonds to be issued, viz., that the state should relinquish so much of its mortgage upon the road as covered the rolling-stock, which should then be mortgaged by the company to the county as security for the \$700,000 of bonds to be issued; that the company should pay into the county treasury, at least thirty days prior to the maturity of the interest, the full amount thereof, in default of which the whole debt should become due, with power in the county to foreclose the mortgage; and, finally, that the proposed act should be submitted for acceptance or rejection to the actual tax-payers of the county.

Another member of the county court offered as a substitute the draft of an order embodying, among other things, an act to be submitted to the legislature authorizing the proposed issue of bonds. This substitute declared that, in view of the importance of the completion of the road to the tax-payers of the county, the court would concur (in case application should be made by the company) in the propriety of the passage of an act "securing the completion of said road and the interest of the county of St. Louis in the said bonds." The proposed act contained this provision:

"Said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad; and the fund commissioner of the Pacific Railroad Company shall pay every month \$4,000, and \$1,000 additional each month of December, to the treasurer of St. Louis county, to meet the interest on the above seven hundred bonds; said payments to continue until said bonds are paid by the Pacific Railroad Company."

The substitute was adopted by the county court, and, being submitted to the legislature of Missouri, that body, on the 7th of January, 1865, passed an act containing additional provisions. It is here given at length, since the case depends mainly, if not altogether, upon the construction which may be given to its provisions:

"SEC. 1. The county court of St. Louis county is hereby authorized to issue seven hundred county bonds of the denomination of \$1,000 each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may

be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

"SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, \$4,000, and \$1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

"This act to take effect and be in force from and after its passage."

This act was accepted by the railroad company. It expressly agreed to comply with all its provisions. In conformity therewith bonds were issued by the county and delivered to the railroad company as follows: One hundred bonds on 20th February, 1875, two hundred bonds on 7th March, 1875, and four hundred bonds on 5th May, 1875. They were sold by the company, and the proceeds applied in the completion of the road to Kansas City.

On 15th of July, 1868, the company executed a first mortgage on its franchises and property for \$7,000,000; on 1st of July, 1871, a second mortgage for \$3,000,000; and on 10th July, 1875, a third mortgage for \$4,000,000,—the latter being the same mortgage which was foreclosed by decree rendered on 6th June, 1876, in *Pacific Railroad v. Ketchum*, 11 Otto, 289. The decree of foreclosure and sale in that case was passed in the circuit court, and has been affirmed here, at the present term, without prejudice to the lien claim of St. Louis county.

In view of these and other facts to be presently detailed, it is difficult to believe that the officers of the company had any expectation whatever that the county would make a *loan* of \$700,000, without security of some sort, and upon the bare promise or covenant of a railroad corporation, staggering under an enormous indebtedness and without credit, that it would meet the interest upon the loan. We have seen that the committee appointed by the company to seek financial aid from the county expressed, officially, the belief that upon the completion of the road its *earnings* would soon furnish all the equipments required for increased business, pay off the \$1,500,000 mortgage, *provide for the payment of the county bonds then asked for*, and in six or seven years thereafter commence paying on the bonds issued by the state for the benefit of the company. But more significant as to the intention of the company and as to the impression which it sought to produce upon the county court is, the fact that, immediately upon the passage of the act, the president of the railroad company, with a view, of course, to influence the action of the county court, presented to that body the written opinion of its counsel, prepared with unusual care, in which he declared: 1. That if the act should be accepted by the company, and the county should make the loan authorized, the act would be binding upon all the parties, in favor of the county court, to wit: the company, the fund commissioner and the state. 2. That an agreement executed by the company expressing its assent to such appropriation of the earnings of the road would create in favor of the county an equitable lien or charge upon the earnings, *pro tanto*. 3. That the direct authorization of such appropriation of the earnings, or rather the direction to the fund commissioner (the trustee) to pay this monthly appropriation out of funds, to the benefit of which it (the state) was entitled, was unquestionably a

waiver or postponement of the interest of the state, *cestui que trust*, in favor of the county, to the extent and for the purpose specified in the act.

"The act," said counsel, "admits of no other construction." That opinion was filed and preserved by the clerk of the county court among its records.

If the railroad company deemed it possible that the county would make a loan of \$700,000 upon the simple promise of the corporation to save it harmless,—if they had not believed that the county court would exact ample security for the protection of its constituents against liability, it would scarcely have been suggested through counsel that the acceptance of the act of January 7, 1865, would amount to a specific *appropriation* of so much of the earnings as would suffice to meet the interest until the bonds were paid off.

We next inquire whether any different belief was indulged by the county court. Did its members intend the loan to be made without securing the county in some effectual mode? These questions must, in view of all the circumstances, be answered in the negative. We have seen that, when the original application was made to the county court, one of the justices submitted a proposition requiring the company to secure the loan by a mortgage upon the rolling-stock, the state to that extent surrendering its mortgage or lien. The substitute which was adopted described the act which it was proposed to submit to the legislature as an act "*securing the completion of the road and the interest of the county of St. Louis in the issue of said bonds.*" The security which the proposed act provided was a direction to the fund commissioner to pay the amount necessary to meet the interest, and to continue such payments until the bonds were paid by the company. It is quite clear that a proposition to make this loan without providing some security against liability would not have been entertained by the county court.

§ 212. *A state legislature, having control of the funds of a railroad company, by directing that the interest of bonds loaned to that company shall be regularly paid out of such funds, creates a lien upon them for that purpose.*

As to the state, it is abundantly clear from the language of the act of 1865, without reference to the circumstances under which it was passed, that the legislature, as an inducement to the county of St. Louis to come forward and save an important enterprise in which the state was largely interested financially, intended to waive the prior statutory lien of the state to the extent necessary to secure the prompt liquidation of the interest on the proposed loan during the whole period the bonds were outstanding and unpaid. The state, at that time, had control of the entire earnings of the railroad, and if the legislature did not intend to forego any priority or advantage then enjoyed by the state, but designed only to give authority to the county to issue its bonds, that purpose could have been accomplished by the first section of the act of 1865, leaving the county and the railroad company to make such terms and conditions as suited them.

The second section of the act shows, beyond question, that the purpose of the legislature was not so restricted,—that its intention was to provide full security to the county in the event the county court exercised the authority given by the act. The draft of the statute submitted by the county court to the legislature contained only a general direction to the fund commissioner to pay the interest, and to continue such payments until the bonds were paid off by the company. But so fixed was the legislature in the purpose to protect the county, that it extended that direction to "such person as may at any time hereafter have the custody of the funds of the company," and, by express

words, required the payments of interest, whether by the fund commissioner or by such other person to be made "out of the earnings of said Pacific Railroad." The object of these additions to the act as submitted by the parties cannot be mistaken. The office of fund commissioner was created by statute, and, consequently, its continuance depended upon the will of the legislature. To meet the contingency of the abolition of that office, the same duty was imposed upon such *person as at any time thereafter should have the custody of the funds of the company*. And that there might be no misapprehension as to the source from which funds to meet the interest were to be derived, the legislature, in effect, gave the assurance that the *earnings* of the railroad by whomsoever held, should supply the amount necessary to that end.

§ 213. *The act of the legislature directing payment of interest out of the earnings of a railroad company is an appropriation of so much of such earnings as are necessary for that purpose, and waives the prior lien of the state.*

In this connection we may notice another important difference between the act in the form in which it was submitted to the legislature and that in which it finally passed. The former provided that the bonds should be issued "under such conditions as may be agreed upon between said county and the board of directors of the Pacific Railroad." But the legislature added the words, "such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued." These last words, but for the succeeding section of the act, would have placed the county at the mercy of the railroad company, and rendered it liable to holders of bonds, whether the company complied or not with the conditions upon which the loan was made. It is manifest that while the legislature intended, by the language last quoted, to facilitate the sale of the bonds, and thereby secure the early completion of the road, it intended also by the second section of the act to assure the county of St. Louis that its absolute liability to holders of its bonds was largely nominal, since, by that section, out of the *earnings* of the property to the extent necessary, and whether the funds of the company were in the custody of the fund commissioner or of some other person, the interest on the bonds should be paid at maturity, and such payments continued until the bonds were paid.

That the legislature intended by the act of 1865 to make a specific *appropriation* of the earnings for that purpose; that the prior lien of the state, was to that extent, waived in favor of the county; and that such appropriation and waiver were, by agreement of all the parties then interested in the property and the disposition of its income, to continue until the bonds themselves were paid or the county discharged from liability thereon, we entertain no doubt. It was not a simple naked covenant to pay out of a particular fund; but the act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund, an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing. It was an arrangement, based upon a valuable consideration, which neither the state nor the company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of which all the parties to the arrangement were directly interested. To construe the act

otherwise will not only do violence to plain words, requiring no construction, but convict the legislature of a deliberate design to entrap the county of St. Louis into incurring an enormous debt primarily for the benefit of the state, which controlled the earnings of the property for its own benefit.

§ 214. *All purchasers of the property of a company and all subsequent mortgagees are bound to take notice of the equitable assignment of the earnings of the company by legislative act, the state being the holder of the first mortgage.*

It remains to inquire whether this agreement or arrangement can be carried into effect consistently with the settled principles of equity. We remark that all parties claiming under mortgages executed by the company after the acceptance of the act of 1865 (none others are interested in the determination of this case) are chargeable with notice of the appropriation of earnings made by that act. "In this country," says Mr. Sedgwick, "the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large." Sedgwick, Stat. and Const. Law, p. 25. That act related to matters in which the general public were concerned, and all were bound to take notice of its provisions.

We are of opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases. In *Legard v. Hodges*, Lord Thurlow said: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed, and therefore this is a pure trust estate," and they must be declared trustees. 1 Ves. Jr., 478. In the report of that case in 3 Bro. C. C., 531, the chancellor says: "I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement." Upon rehearing, the former decree was affirmed. 4 id., 422.

In *Re Strand Music Hall Company*, 3 De G., J. & S., 147, the question arose whether that company had created a valid charge on their real property. "There can, I think," said Lord Justice Turner, "be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

§ 215. *Where a party by agreement creates a lien or charge on his property, a court of equity will enforce it against him and all volunteers under him.*

The doctrine is thus stated by Mr. Justice Story in his *Equity Jurisprudence*, vol. II, sec. 1231: "Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself and any claiming under him voluntarily or with notice, such an

agreement raises a trust." The author cites in support of these views, *Legard v. Hodges, supra*.

So, also, in *Pinch v. Anthony and others*, 8 Allen (Mass.), 536. "It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it."

In the recent work of Mr. Jones on Mortgages (vol. i, sec. 162), the author remarks: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common-law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages." So, also, in his treatise on Railroad Securities, page 57, the same author says: "An agreement of a company to set apart specific earnings or property in the hands of a third person, to meet the interest or principal of its bonds, creates an equitable lien or charge." Willard, Eq. Jur., 462; *Watson v. The Duke of Wellington*, 1 Russ. & Myl., 602; *Yates v. Groves*, 1 Ves. Jr., 279; *Lett v. Morris*, 4 Sim., 602; *Ex parte Alderson*, 1 Madd., 39.

Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the railroad company as security for the loan by the county was in pursuance of a special act of the legislature; and in sustaining the decree below we give effect to the legislative will as to matters over which its authority unquestionably extended.

It will be observed that we have made no allusion to the act of March 30, 1868, subsequently to the passage of which the first, second and third mortgages were executed. In behalf of the plaintiffs in error, it is contended that the act of 1868 shows the construction given by the circuit court to the act of 1865 to be inadmissible. The answer to this proposition is twofold: 1st. The act of March 30, 1868, furnishes, upon its face, evidence to all that the state felt itself under obligation to provide for the security of the county on account of the loan made to the railroad company, under the authority of the act of January 7, 1865. 2d. Be that as it may, if, as we have held, the act of 1865, and its acceptance by the parties, constituted a contract by which the state waived its lien, in favor of St. Louis county, to the extent and for the purpose therein indicated, and by which the state, the railroad company, and the county appropriated the company's earnings to the payment of the interest on the county's bonds, such payments to continue until the bonds were paid off by the company, no subsequent legislation could deprive the county of the security thus acquired. Nor could parties, who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the act of 1865, destroy the equitable lien of the county, even with the consent of the railroad company. With that lien the property itself was

chargeable by whomsoever it or the funds accruing therefrom are or may be held.

By an order heretofore made in this court, the city of St. Louis was allowed to intervene in this cause for the purpose of protecting such interest as it may have herein, and for the purpose of being heard at the argument. The claim of the city is, that by the constitution and laws of Missouri, it has assumed the position formerly occupied by the county of St. Louis under the act of January 7, 1865,—that the instalments of money required by the act to be paid monthly into the county treasury are due and payable to the city treasury, and that it has been subrogated to the rights and liabilities of the county as to all matters arising out of the issue of the bonds in question.

Since the making of that order, a written stipulation has been filed in this court signed by all the parties to the record, including the city, agreeing that in the event the decree below is affirmed, the city of St. Louis shall be substituted therein in lieu and place of the county of St. Louis. The stipulation will be entered at large upon the record, and an order entered substituting the city to all the rights acquired by the county in virtue of the decree below.

We deem it unnecessary to allude to any other points discussed by counsel. We have noticed all deemed by us material. What has been said is sufficient to dispose of the cause upon its merits. Perceiving no error in the decree, it is, in all respects, affirmed. (a)

Dissenting opinion by MR. JUSTICE STRONG.

I cannot concur in the judgment given in this case. I am unable to discover in the contract between the company and the county, or in the act of the legislature, or in both, anything that created an equitable lien upon the earnings of the railroad company, or upon any of its property. Nothing more is expressed than a confident expectation that the earnings would prove sufficient to pay the interest on the county loan.

MR. JUSTICE BRADLEY dissented.

§ 216. Enforcement.—Where there are liens on the property of a railroad company, held by various parties, such liens must be adjusted in chancery where each claimant shall receive his proportionate share of the proceeds. *Coe v. Hart*, * 6 Am. L. Reg., 27.

§ 217. Mortgages.—A statute to confer a lien upon a railroad as against other mortgages, etc., in favor of one party for credit advanced, must be explicit and positive. Thus, where the legislature authorized the city of Cincinnati to issue its bonds to a certain railroad, and provided that the mortgages, transfers, or hypothecations of stock of said company, or other liens or securities to secure such loan, should have priority over subsequent incumbrances, and the city, upon making the loan, took a hypothecation, mortgage and pledge of twenty thousand shares of the company's *capital stock*, held, that under the circumstances no lien on the road was given, by virtue of the statute, to the city as against subsequent lienholders. *Cincinnati City v. Morgan*, 3 Wall., 275.

§ 218. A mortgage, given by a railroad company, covering after-acquired property does not displace a lien existing on the property at the time of, or created simultaneously with, its acquisition. Such mortgage can only attach itself to the property in the condition in which it came into the mortgagor's hands. This is true of loose property susceptible of separate ownership, such as locomotives and cars. Otherwise as to rails or other material which becomes a part of the road itself. (*Galveston Railroad v. Cowdrey* distinguished.) *United States v. New Orleans Railroad*, 12 Wall., 362.

§ 219. A mortgage given on the entire property of a railroad, including future receipts for transportation, with an agreement that property on the road subsequently acquired shall be bound, and a conveyance of it duly executed, gives an equitable lien on property subsequently acquired, to the holders of bonds secured by the mortgage, although the mortgage as to such

subsequently acquired property might not be operative at common law. *Coe v. Hart*,* 6 Am. L. Reg., 27.

§ 220. Whenever parties by their contract intend to create a lien upon property not then in actual existence, it attaches in equity as soon as the person who grants the lien acquires the possession and title of the same. So held where a mortgage was given upon the after-acquired property of a railroad company. *Barnard v. Norwich & Worcester Railroad*,* 8 Cent. L. J., 608.

§ 221. Under the law of Ohio (act of April 11, 1861), where a sale of the roadway and all appurtenances has been made under a decree upon a mortgage, and confirmed before a judgment has been rendered, there can be no lien at law of the judgment upon such property, and none in equity upon the proceeds of sale. Thus a corporation existed in Ohio known as the Cincinnati, Wilmington & Zanesville Railroad Company, owning and operating a road from Zanesville to Morrow in that state, which became insolvent, and the road was sold on the 3d of June, 1863, under foreclosure of a mortgage, when Charles Moran became the purchaser. The original company being reorganized on the 11th of March, 1864, pursuant to a statute of the state, under the name of the Cincinnati & Zanesville Railroad Company, on the 12th of March, 1864, Moran conveyed to the new company, which thereupon executed to him and W. Shall a mortgage to secure the payment of certain bonds, bearing date the first of April, 1864. And default being made in the payment of interest upon the bonds, Moran on the 30th of April, 1869, filed a bill of foreclosure in the court below. On the 4th of May following, the road was put into the charge of the officers of the company as receivers. On the 6th of October then next, a final decree was entered, finding the amount due, and ordering the premises to be sold unless it was paid in twenty days. On the 2d of December following a sale was reported, and on the same day confirmed by the court, the proceeds being largely less than the amount intended to be secured by the mortgage. On the 22d of June, 1866, Zentmeyer, the appellant's intestate, was killed on the road, and on the 16th of July, 1867, the appellant, as his administrator, sued the company in the court of common pleas of Clinton county, and on the 28th of February, 1871, recovered a judgment for \$5,000. On the 5th of November, 1875, he was made a party to the foreclosure proceedings, and answered, and filed a cross-bill in the nature of a creditor's bill, claiming to have the judgment paid out of the proceeds of the sale of the road in the hands of Moran. The court having decreed against him, on appeal the decree was affirmed. *Jeffrey v. Moran*,* 11 Otto, 285.

§ 222. A statutory mortgage, providing that bonds issued by the state to a railroad company should constitute a first lien and mortgage upon the road and property of the company, extends to and covers all the corporate property of the railroad company, including outside lands of the company, not constituting the road or any part thereof. And the title of one who purchases such land from trustees of the company to whom they had conveyed the same is inferior to that of a purchaser from the state, which acquired them under a foreclosure of the mortgage. *Wilson v. Boyce*,* 2 Otto, 320.

§ 223. Certain parties furnished supplies to a railroad in Illinois run under a lease, and when an assignment was made by the lessee the assignees agreed to pay the expenses incurred in running the road by said original lessee. Afterwards, when the road came into the hands of a receiver, they claimed an equitable lien upon the funds realized from the earnings of the road. Held, that they had no specific lien upon the property, and that they could not be paid until prior mortgages had been satisfied. *Denniston v. Chic., A. & St. L. R. Co.*,* 4 Biss., 414.

LIFE ESTATES.

See LAND.

LIFE INSURANCE.

See INSURANCE.

LIFE, LIBERTY AND PROPERTY.

See CONSTITUTION AND LAWS.

LIGHTERMEN.

See CARRIERS; MARITIME LAW.

LIMITATIONS.*

[In Bankruptcy, see DEBTOR AND CREDITOR, B, III. Limitation Clause in Insurance Policies, see INSURANCE, A, VII.]

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| <p>I. GENERAL PRINCIPLES, §§ 1-199.</p> <ol style="list-style-type: none"> 1. <i>Constitutionality of Statutes of Limitation</i>, §§ 1-34. 2. <i>Lex Fori</i>, §§ 35-55. 3. <i>Pleading and Proof</i>, §§ 56-115. 4. <i>What Causes the Statute Affects</i>, §§ 116-139. 5. <i>State Statutes in United States Courts</i>, §§ 140-170. 6. <i>Miscellaneous Principles</i>, §§ 171-199. <p>II. WHEN THE STATUTE BEGINS TO RUN, §§ 200-291.</p> <p>III. LIMITATIONS IN EQUITY (EXCLUSIVE OF ACTIONS AFFECTING THE TITLE TO REAL PROPERTY), §§ 292-502.</p> <ol style="list-style-type: none"> 1. <i>Effect of the Statute</i>, §§ 292-310. 2. <i>Laches</i>, §§ 311-397. 3. <i>Fraud</i>, §§ 398-437. 4. <i>Mistake</i>, §§ 438-443. 5. <i>Mortgages</i>, §§ 444-489. 6. <i>Trusts</i>, §§ 470-502. <p>IV. LIMITATIONS AT LAW (EXCLUSIVE OF ACTIONS AFFECTING THE TITLE TO REAL PROPERTY), §§ 503-556.</p> <p>V. LIMITATIONS IN CRIMINAL CASES, §§ 557-585.</p> | <p>VI. LIMITATIONS IN ADMIRALTY, §§ 586-606.</p> <p>VII. LIMITATIONS IN REAL ACTIONS, §§ 607-899.</p> <ol style="list-style-type: none"> 1. <i>Simple Adverse Possession in Actions at Law</i>, §§ 607-728. 2. <i>Adverse Possession in Suits in Equity</i>, §§ 729-771. 3. <i>Possession under Color of Title</i>, §§ 772-832. 4. <i>Adverse Possession of Vacant Property</i>, §§ 833-866. 5. <i>Tenants in Common</i>, §§ 867-886. 6. <i>Tacking Possession</i>, §§ 887-899. <p>VIII. THE STATE, §§ 900-936.</p> <p>IX. REMOVAL OF THE STATUTORY BAR, §§ 937-1001.</p> <ol style="list-style-type: none"> 1. <i>Acknowledgment and New Promise</i>, §§ 937-995. 2. <i>Part Payment</i>, §§ 996-1001. <p>X. SUSPENSION OF THE RUNNING OF THE STATUTE, §§ 1002-1094.</p> <p>XI. DISABILITIES AND EXCEPTIONS, §§ 1095-1157.</p> <p>XII. MISCELLANEOUS CASES, §§ 1158-1200.</p> |
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I. GENERAL PRINCIPLES.

1. *Constitutionality of Statutes of Limitation.*

SUMMARY — *Exceptions as between resident and non-resident creditors*, § 1. — *Shortening period*, § 2. — *Judgments of other states*, § 3. — *Compact between Virginia and Kentucky*, § 4.

§ 1. A provision contained in a statute of limitations, that in case the defendant is out of the state the statute of limitations shall run against a non-resident creditor, but not against a resident creditor, is constitutional. So held in an action brought by a corporation resident in New York against a citizen of Wisconsin, in the latter state. The defendant demurred on the ground that it appeared on the face of the complaint that the claim was barred by the statute of limitations. The statute contained an exception suspending the running of the statute in favor of resident creditors as against non-residents. *Chemung Canal Bank v. Lowery*, §§ 5, 6.

§ 2. A state legislature has power to pass an act shortening the time within which to commence an existing cause of action. Such an act is not unconstitutional, provided a reasonable time is allowed within which to commence an action. So held where a town had, in 1857, issued bonds with coupons attached. At that time the limitation provided in which to commence actions on coupons was twenty years. By act of 1872 the period was reduced to six years, but actions then accrued might be brought within one year after the passage of the act if they would otherwise be barred if not brought within that period. *Koshkonong v. Burton*, §§ 7-12.

§ 3. An action was brought by the Bank of the State of Alabama to recover of one Dalton, then a citizen of Mississippi, the amount of a recovery had in a court in Alabama in 1848. The action was commenced in 1848. The defendant pleaded the statute of limitations of 1844 which barred suits on judgments obtained out of the state before the act was passed, unless suit was brought thereon within two years after the date of the act. The plaintiff replied that the defendant had been and continued a citizen of Alabama up to the date of issuing the process. The court held that the act of 1790, which declares that full faith and credit shall be given to the records and judicial proceedings of one state in the others, did not prevent a state from passing acts of limitation to bar judgments rendered in another state. *Bank of the State of Alabama v. Dalton*, §§ 13, 14.

§ 4. Joshua Barney brought an action of ejectment against Hawkins to recover a part of a tract of land in his possession within the limits of Barney's patent. Both claimed under Virginia patents, Barney's being the elder. The premises had been in possession of defendant and his grantor since 1796, down to the commencement of the suit in 1817. It was held that the limitation act of Kentucky, known as the seven years' law, was constitutional, and was not prohibited by the compact between that state and Virginia. *Hawkins v. Barney*, §§ 15-18.

[NOTES.—See §§ 19-34.]

CHEMUNG CANAL BANK v. LOWERY.

(8 Otto, 72-78. 1876.)

ERROR to U. S. Circuit Court, Western District of Wisconsin.

STATEMENT OF FACTS.—The Chemung Canal Bank, a New York corporation, sued Lowery, a citizen of Wisconsin, on a judgment rendered more than ten years before the commencement of the action. The defendant demurred on the ground that it appeared upon the face of the complaint that the action was barred by the statute of limitations. Judgment for defendant on the demurrer.

Opinion by MR. JUSTICE BRADLEY.

The errors assigned in this case are substantially two: *First*, that the statute of limitations cannot be set up by demurrer; and, *secondly*, that the statute on which the defense is founded is unconstitutional in this, that it unjustly discriminates in favor of the citizens of Wisconsin against the citizens of other states; for, if the plaintiff had been a citizen of Wisconsin, instead of a citizen of New York, the statute would not have applied.

§ 5. *Under the statutes and decisions of Wisconsin the statute of limitations may be set up by demurrer.*

As to the first assignment, it is undoubtedly true that the statute of limitations cannot, by the English practice, be set up by demurrer in actions at law, though it may be in certain cases in suits in equity. And this rule obtains wherever the English practice prevails. But where the forms of proceeding have been so much altered as they have been in Wisconsin, further inquiry must be made. In the first place, by the Revised Statutes of that state, passed in 1858, in the title "Of proceedings in civil actions," it is declared that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." R. S., 714. Secondly, that "all the forms of pleading heretofore existing are abolished." The act proceeds to declare that the first pleading on the part of the plaintiff is the complaint, which shall contain, amongst other things, "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." R. S., 721. It provides that the defendant may demur for certain causes, but that other defenses must be taken by

answer. *Id.* Amongst the grounds of demurrer, one is, "that the complaint does not state facts sufficient to constitute a cause of action." In another title,—“Of the limitation of actions,”—it is provided that “the objection that the action was not commenced within the time limited can only be taken by answer.” R. S., 819. But the supreme court of Wisconsin has decided, that, when on the face of the complaint itself it appears that the statutory time has run before the commencement of the action, the defense may be taken by demurrer, which, for that purpose, is a sufficient answer. *Howell v. Howell*, 15 Wis., 55. This case has been recognized in later cases (see *Tarbox v. Supervisors*, 34 Wis., 561), and must be regarded as expressing the law of the state. On the first hearing of the case of *Howell v. Howell*, some importance was attached to the fact that it was an equity case, in which class of cases a demurrer has been allowed for setting up the statute of limitations; but, on a rehearing, a more enlarged view was taken, and a demurrer was regarded as sufficient in all cases where the lapse of time appears in the complaint without any statement to rebut its effect, and where the point is specially taken by the demurrer. If the plaintiff relies on a subsequent promise, or on a payment, to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution, the complaint is defective in not stating, as required by the statute, facts sufficient to constitute a cause of action. But, although defective, advantage cannot be taken of the defect on motion, or in any other way than by answer; which answer, however, as we have seen, may be a demurrer.

As this is the law of Wisconsin, the circuit court of the United States for the western district of Wisconsin is bound by it; and, as the decision in the principal case accords therewith, the first assignment of error cannot be sustained.

§ 6. *A provision that in case defendant is out of the state the statute of limitations shall run against a non-resident creditor but not against a resident creditor is constitutional.*

The other assignment calls in question the constitutionality of the statute of limitations itself. The statute having prescribed the time within which various actions must be brought,—amongst others that “an action upon a judgment or decree of any court of record of any state or territory of the United States, or of any court of the United States,” must be brought within ten years,—it declares that “if, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited, after the return of said person into this state. But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue are residents of this state.” R. S. Wis., 822. This statute may be expressed shortly thus: When the defendant is out of the state, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall if he resides out of the state. The argument of the plaintiff is, that, as the law refuses to non-residents of the state an exemption from its provisions, which is accorded to residents, it is repugnant to that clause of the constitution of the United States (art. 4, sec. 2) which declares that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” It is contended that if the resident creditors of the state may sue their non-resident debtors at any time within six or ten years after they return to the state, non-resident creditors

ought to have the same privilege, or else an unjust and unconstitutional discrimination is made against them. This seems at first view somewhat plausible, but we do not regard the argument as a sound one. There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside; and yet, if the defendant should be found in Wisconsin,—it may be only in a railroad train,—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. *Beardsley v. Southmayd*, 3 N. J. L. (Green), 171.

It is also to be considered that a personal obligation is due at the domicile of the obligee. It is the duty of the debtor to seek the creditor, and pay him his debt, at the residence of the latter. Not doing this, he is guilty of laches against the law of the creditor's domicile, as well as his own. But he evades this law by absenting himself from the jurisdiction. As long as he does this, the statute of limitations of that jurisdiction ought not to run to the creditor's prejudice. This cannot be said with regard to the non-resident creditor. It is not the laws of Wisconsin any more than those of China which his non-resident debtor condemns by non-payment of the debt and absence from the state; it is the laws of some other state. Therefore, there is no reason why the statute of limitations of Wisconsin should not run as against the non-resident creditor; at least there is not the same reason which exists in the case of the resident creditor. If the non-resident creditor wishes to keep his action alive in other states than his own, he must reduce it to judgment and revive that judgment from time to time. Each new judgment would create a new cause of action, and would prevent the operation of the statutes of limitation of other states.

We are of opinion, therefore, that the law in question does not produce any unconstitutional discrimination; and we prefer putting the case upon this broad ground, rather than to examine into the rights of the plaintiffs as a foreign corporation doing business in Wisconsin.

Judgment affirmed.

MR. JUSTICE STRONG concurred in the judgment, but dissented from the opinion upon the second assignment.

KOSHKONONG v. BURTON.

(14 Otto, 668-680. 1881.)

ERROR to U. S. Circuit Court, Western District of Wisconsin.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The object of this action, which was commenced on the 12th day of May, 1880, is to recover the amount due on bonds, with interest coupons attached, issued on the 1st day of January, 1857, by the town of Koshkonong, a municipal corporation of Wisconsin, pursuant to authority conferred by an act of the legislature of that state. They were made payable to the Chicago, St. Paul & Fond du Lac Railroad Company, or its assigns, on the 1st day of January, 1877, at the American Exchange Bank, in the city of New York, with interest at the rate of eight per cent. per annum, payable

semi-annually, on the presentation of the interest warrants at that bank on the 1st day of each July and January, until the principal sum should be paid. Of the bonds in suit, with their respective coupons, Burton became the owner by written assignment from the railroad company, indorsed upon the bonds, under date of November 16, 1857. None of the coupons have ever been detached from the bonds nor paid, except those maturing July 1, 1857, and January 1, 1858.

The coupons are all alike except as to dates of maturity. They are complete instruments, capable of sustaining separate actions, without reference to the maturity or ownership of the bonds. *Commissioners of Knox County v. Aspinwall*, 21 How., 539 (Bonds, §§ 1413-18); *Clark v. Iowa City*, 20 Wall., 583; *Amy v. Dubuque*, 98 U. S., 470 (§§ 209-11, *infra*). The following is a copy of the one last due: "The town of Koshkonong will pay to the holder hereof, on the 1st day of January, 1877, at the American Exchange Bank, in the city of New York, \$40, being for half-yearly interest on the bond of said town No. 22, due on that day. S. R. Crosby, clerk."

The main question is whether the action, as to coupons maturing more than six years prior to its commencement, is not barred by the statutes of limitation of Wisconsin. The court below being of opinion that no part of plaintiff's demands was barred gave judgment for the principal of the bonds, with interest from the 1st day of January, 1877, at the stipulated rate of eight per cent. per annum until paid, and also for the amount of each coupon in suit, with interest from its maturity at the rate of seven per cent. per annum, the latter being the rate established by the local law in the absence of a special agreement by the parties.

The present writ of error questions the correctness of that judgment, as well because it overrules the defense of limitation to coupons maturing more than six years before the commencement of this action, as because it allows interest upon the amount of each coupon from its maturity.

The statutes of Wisconsin, in force when the bonds and coupons were issued, provided that "all actions of debt founded upon any contract or liability, not under seal" (except such as are brought upon the judgment or decree of some court of record of the United States, or of a state or territory of the United States), shall be commenced within six years after the cause of action accrued, and not afterwards; and that all personal actions on any contract, not otherwise limited by the laws of the state, shall be brought within twenty years after the accruing of the cause of action. R. S. Wis., 1849, secs. 14-22, pp. 644, 645.

We remark that the foregoing provisions, without substantial change of language, were taken from the statutes of the territory of Wisconsin, adopted in 1839. Further, that the revision of 1849 did not, in terms, prescribe any limitation to actions upon sealed instruments. They were, therefore, embraced by the limitation of twenty years as to personal actions on contracts not covered by other provisions.

The revision of 1849 was superseded by one made in 1858, which went into operation on the 1st day of January, 1859. By the latter, as modified by an act passed in 1861, civil actions, other than for the recovery of real property, were required to be commenced within the following periods: Actions upon judgments or decrees of courts of record of the state, and actions upon sealed instruments when the cause of action accrued in the state, within twenty years (R. S. Wis., 1858, ch. 138, sec. 15); actions upon the judgments

or decrees of courts of record of any state or territory of the United States or of courts of the United States, and actions upon sealed instruments when the cause of action accrued out of the state, within ten years (sec. 16); and actions upon contracts, obligations or liabilities, express or implied, excepting those mentioned in sections 15 and 16, within six years, the time to be computed in each case from the date when the cause of action accrued. Gen. Laws Wis., 1861, p. 302. The revision of 1858 also contained the general clause that, "in any case where a limitation or period of law prescribed in any of the acts hereby repealed [which included the revision of 1849], for the acquiring of any right or barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the Revised Statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the Revised Statutes." Id., ch. 191, sec. 13, p. 1038.

Thus stood the law of the state until the 9th day of March, 1872,—a little over fifteen years after these bonds and coupons were issued,—when an act was passed entitled "An act to limit the time for the commencement of action against towns, counties, cities and villages on demands payable to bearer." It provided that "no action brought to recover any sum of money, on any bond, coupon, interest warrant, agreement or promise in writing, made or issued by any town, county, city or village, or upon any instalment of the principal or interest thereof, shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has or shall become due, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order: *Provided*, that any such action may be brought within one year after this action shall take effect: *Provided further*, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." Gen. Laws Wis., 1872, p. 56.

Our attention has also been called to certain sections in the revision of the statutes of Wisconsin of 1878, which went into operation on the 1st day of November of that year, superseding that of 1858, as well as the act of 1872. Those sections contain, in substance, the clauses first quoted from the revision of 1858, with the modifications made by the act of 1872. R. S. Wis., 1878, pp. 1015, 1016. It is to be observed in this connection — for it has some bearing upon what we shall presently say — that section 4220 of the revision of 1878 in terms prescribed twenty years as the limitation for "an action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in section 4222;" while the latter section embraces, among others, "an action upon any bond, coupon, interest warrant or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this state,"—thus indicating that the framers of the revision of 1878 regarded municipal securities for the payment of money as belonging to the class of sealed instruments. We observe, also, that the revision of 1878 contains a provision in reference to those cases in which limitation had commenced to run, similar to that already quoted from the revision of 1858. R. S. 1878, sec. 4984; R. S. 1858, p. 1038.

§ 7. *In Wisconsin the right of action on coupons accrues at the date of their maturity, and the statute of limitations then begins to run. (a)*

From the foregoing summary it will be seen that by the local law, when

the bonds in suit were issued, all civil actions for debt, founded on contract or liability, not under seal (except actions upon judgments or decrees of some court of record of the United States, or of a state or territory), could be brought within six years after the cause of action accrued, and not afterwards; while such actions, if founded on contract or liability, under seal, would not be barred until twenty years after the cause of action accrued. If, as contended by plaintiff, the question of limitation is to be determined exclusively by the revision of 1849, in force when the bonds were issued, and if, as is further insisted, an action on municipal bonds and coupons, such as are here in suit, is, within the meaning of that revision, "founded on contract or liability, not under seal," it is clear that, without reference to the statute of 1872, this action is barred as to all coupons maturing more than six years before its commencement, whether such coupons were separated or not from the bonds to which they were originally attached. This, upon the authority of *Amy v. Dubuque*, 98 U. S., 470 (§§ 209–11, *infra*), with the doctrines of which we are entirely satisfied. We there said, construing the statutes of Iowa upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that "upon the non-payment at maturity of each coupon the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. . . . Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment could not prevent the statute from running."

But we are inclined to the opinion — although uninformed upon the subject by any direct decision of the supreme court of the state to which our attention has been called — that municipal bonds and coupons were regarded by the framers both of the revision of 1849 and that of 1858 as alike sealed instruments to which the limitation of twenty years was applicable. The word "bond" at common law (and even now as a general rule) imports a sealed instrument. And although, under some circumstances, a municipal corporation issuing and delivering bonds and coupons in aid of railroad enterprises may be liable thereon, notwithstanding they are unattested by its corporate seal, we are satisfied that the legislature of Wisconsin intended, by the revision of 1849 as well as that of 1858, to prescribe the same limitation for actions upon such obligations as was in terms prescribed for actions upon what, technically or in common legal parlance, are denominated sealed instruments. If this interpretation of the revision of 1849 and 1858 be correct, it would follow that this action was not, at the passage of the act of 1872, barred by limitation as to any of the coupons in suit. Twenty years had not then expired from the maturity of any of them.

§ 8. *Effect of statute of limitations on actions accrued before its passage.*

It remains now to inquire as to the effect of the act of 1872 upon municipal obligations executed and outstanding at the date of its passage. Of the object of that statute there cannot, it seems to us, be any reasonable doubt. The specific reference to coupons and interest warrants made or issued by towns, counties, cities and villages, without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the legislature to reverse the policy which had been pursued by holders of such

securities, of postponing the collection of interest coupons until after the bonds to which they were annexed had matured,—a delay which had the effect, in some instances, of compelling municipal corporations to meet all at once a large indebtedness, which the legislature intended, at least as to the interest accruing thereon, should be provided for in instalments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated.

We are here met with the argument that the act of 1872, neither in terms nor by necessary implication, applies to any municipal obligations except those “payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order;” whereas the bonds in suit are payable to the railroad company *or its assigns*, and the coupons are payable to the *holder* thereof. Waiving any expression of opinion as to whether the phrases “payable . . . to the order of some person,” or “payable . . . to some person or his order,” do not, upon a reasonable construction of the act, embrace the case of a bond payable to a railroad company or its assigns,—a question which need not be determined, since it is conceded that the action as to the principal of the bonds is not, in any view of the case, barred by limitation,—we are of opinion that a coupon, payable to the holder thereof, is, within the meaning of the act and according to the usages of the commercial world, payable to bearer. Consequently the suit, as it respects interest coupons, is embraced by the terms of the act of 1872.

§ 9. *Effect of statute shortening the period of limitation on actions already accrued.*

But the further contention of plaintiff's counsel is, that the act of 1872 is unconstitutional as impairing the obligation of the contract between the town and the holders of its securities. This objection is founded upon the proviso, which declares that “any such action [of the class specified in the act] may be brought [only] within one year” after the act takes effect. While that proviso is very obscurely worded, its meaning is, that no action to recover money due upon a municipal bond, coupon, interest warrant, or written agreement or promise, or upon any instalment of the principal or interest thereof, whether such obligations were issued before or after the passage of the act, should be maintained, unless brought within six years (not from the passage of the act, but) from the time the money sued for became due; except—and no other exception is made—that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the act passed, the action should not be barred, if brought within that year. It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. *Terry v. Anderson*, 95 U. S., 628 (§§ 226–29, *infra*); *Hawkins v. Barney*, 5 Pet., 457 (§§ 15–18, *infra*); *Jackson v. Lamphire*, 3 id., 280 (Const., §§ 1845–48); *Sohn v. Waterson*, 17 Wall., 596 (§§ 119–20, *infra*); *Christmas v. Russell*, 5 id., 290 (Judge., §§ 1121–25); *Sturges v. Crowninshield*, 4 Wheat., 122 (Const., §§ 1937–39); *Osborn v. Jaines*, 17 Wis., 573; *Parker v. Kane*, 4 id., 1; *Falkner v. Donman*, 7 id., 388.

Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other states holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand. And we think it is not. For if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire act would fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statutes in force prior to the act of 1872—to a reasonable time after its passage within which to sue. And if a proper construction of that act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the act of 1872. It is, consequently, barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained.

§ 10. *An express agreement to pay interest at a specified time entitles the holder of the obligation to interest upon interest from the time the interest becomes due.*

The question next to be considered relates to that portion of the judgment allowing interest upon the amount of each coupon from its maturity. The general proposition suggested by this question seems to have been determined, in 1865, in *Mills v. Town of Jefferson*, 20 Wis., 50. That was a suit upon interest coupons attached to bonds issued by a municipal corporation to a railroad company, under the authority of an act passed in the year 1857. The coupons were similar to those here in suit. While recognizing the fact that many courts of high authority had disallowed interest upon interest, the supreme court of Wisconsin expressed its approval of those cases in which it was adjudged that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. "For," said the court, "when a person agrees to pay interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment? If he undertakes to pay in a sum at a given time to the owner and makes default, the law allows interest on the sum wrongfully withheld from the time he should have made such payment." To the same effect is *Pruyn v. City of Milwaukee*, 18 Wis., 367, where, without question, so far as we can gather from the report of the case, interest upon interest was given upon the amount of coupons from their respective maturities. We remark, in this connection, that among the authorities cited by the state court in *Mills v. Town of Jefferson*, in support of its conclusion, is *Gelpcke*

v. City of Dubuque, 1 Wall., 175 (BONDS, §§ 1367-70), where it was said (the suit being upon coupons of municipal bonds) that, "if the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed." In harmony with this view are *Aurora City v. West*, 7 Wall., 82; *Town of Genoa v. Woodruff*, 92 U. S., 502; *Amy v. Dubuque*, 98 id., 470 (§§ 209-11, *infra*), and *Walnut v. Wade*, 103 id., 683.

§ 11. *The right to interest upon interest allowed upon contracts by the laws existing when they were made cannot be impaired by subsequent legislation.*

Another question arises upon this branch of the case. The law of Wisconsin, as declared in *Mills v. Town of Jefferson*, remained, without attempt to change it, until March 3, 1868, when an act was passed entitled "An act to construe sections 1 and 2 of chapter 160 of the General Laws of 1859, and to amend section 2 of said chapter." Its first and second sections are as follows:

"1. It was and is the true intent and meaning of sections 1 and 2 of chapter 160 of the General Laws passed in the year 1859, and of all other laws heretofore enacted in the state prescribing and limiting the rate of interest, that interest should not be compounded, or bear interest upon interest, unless an agreement to that effect was clearly expressed in writing, and signed by the party to be charged therewith.

"2. Section 2 of chapter 160 of the General Laws of 1859 is hereby amended by adding thereto the following: 'And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest.'" Gen. Laws Wis., 1868, pp. 62, 63.

In the Revised Statutes of 1878 the following provision appears:

"SEC. 1689. . . . And in the computation of interest upon any bond, note or other instrument or agreement, interest shall not be compounded, nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

§ 12. *Constitutionality of a law declaratory of the intent and meaning of an existing law.*

It is contended that the foregoing enactments govern the present case and preclude recovery of interest upon the amount of the respective coupons from their maturities. In this view we do not concur. By the first section of the act of 1868, the legislature assumed to declare what was the true intent and meaning of previous legislation prescribing and limiting the rate of interest. It was said by Chancellor Walworth, in *Salters v. Tobias*, 3 Paige (N. Y.), 338, 344, that "in England, where there is no constitutional limit to the powers of parliament, a declaratory law forms a new rule of decision, and is valid and binding upon the courts, not only as to cases which may subsequently occur, but also as to pre-existing and vested rights. But even then the courts will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what

the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it." When counsel in *Ogden v. Blackledge*, 2 Cranch, 272, 277, announced that to declare what the law is or has been is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point.

Prior to the passage of the act of 1868, the highest judicial tribunal of the state had adjudged that, when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the act of 1868, that declaration was accompanied by a distinct provision, in terms, changing the pre-existing law. In *Stockdale v. Insurance Co.*, 20 Wall., 331, this court, speaking by Mr. Justice Miller, said that "both on principle and authority it may be taken to be true that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may, in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated." Sedgwick, *Contr. Stat. and Const. Law* (2d ed.), pp. 214, 227; Cooley, *Const. Lim.*, 93, 94. It is clear, therefore, that neither the act of 1868 nor the provision quoted from the revision of 1878, which is but a continuation of the second section of the act of 1868, can be deemed applicable to the case before us. The contract between the town and the holders of its securities was entered into prior to those enactments, and the rights of the parties must necessarily be determined by the law as it was when the contract was made. It was not within the constitutional power of the legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right under the law of the state.

Without pursuing the case further, it is sufficient to say that we do not concur with such of the views of the learned district judge as are inconsistent with those here announced. The judgment must be reversed, with directions to enter judgment in behalf of plaintiff for the amount of the bonds, with interest at the stipulated rate, from their maturity until paid (*Spencer v. Maxfield*, 16 Wis., 185; *Pruyn v. City of Milwaukee*, *supra*), and also for the respective amounts of those coupons only which fell due within six years preceding the commencement of this action, with interest thereon at the rate established by the law of the state; and it is so ordered.

BANK OF THE STATE OF ALABAMA *v.* DALTON.

(9 Howard, 522-529. 1849.)

ERROR to U. S. Circuit Court, Northern District of Mississippi.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—An action was brought by the plaintiff to recover of the defendant, then a citizen of Mississippi, the sum of \$1,844 debt, and

\$110 damages, the amount of a recovery had in the circuit court of Tuscaloosa county, and state of Alabama, on the 7th day of February, 1843, by the plaintiff against the defendant. This suit was instituted in the district court of the United States for the northern district of Mississippi, at Pontotoc. The writ was issued on the 10th day of November, 1846. The defendant, at the December term, 1846, pleaded the statute of limitations of 1844, which bars (1) all suits on judgments recovered within the state after the lapse of seven years; and (2) all suits on judgments obtained out of the state in six years, in cases of judgments thereafter rendered; and (3) all suits on judgments obtained out of the state before the act was passed are barred, unless suit be brought thereon within two years next after the date of the act. On this latter provision the defense depends.

To this plea of the statute of limitations the plaintiff replied that at the time of the rendition of the judgment in Alabama the defendant was a citizen of the state of Alabama, and continued so to be up to the 10th of November, 1846, the day on which this suit was brought. To this replication there was a demurrer by the defendant, which the court sustained, upon the ground that the statute barred the action.

It would seem that the defendant removed his domicile from Alabama to Mississippi, and was followed by the judgment, and immediately sued on reaching there, as he does not call in question the allegation contained in the declaration that he was, when sued, a citizen of Mississippi.

The stringency of the case is, that the act of limitations of Mississippi invites to the state and protects absconding debtors from other states, by refusing the creditor a remedy on his judgment, which is in full force in the state whence the debtor absconded. And it is insisted, on behalf of the plaintiff, that here is a case where the laws of Mississippi did not operate on either party, plaintiff or defendant, nor on the foreign judgment, until the day on which suit was brought, and that therefore no bar could be interposed founded on the lapse of time, as none had intervened.

That acts of limitation furnish rules of decision, and are equally binding on the federal courts as they are on state courts, is not open to controversy; the question presented is one of legislative power, and not practice. In administering justice to enforce contracts and judgments the states of this Union act independently of each other, and their courts are governed by the laws and municipal regulations of that state where a remedy is sought, unless they are controlled by the constitution of the United States, or by laws enacted under its authority. And one question standing in advance of others is, whether the courts of Mississippi stood thus controlled, and were bound to reject the defense set up under the state law, because, by the supreme laws of the Union, it could not be allowed.

The constitution declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." No other part of the constitution bears on the subject. The act of 26th May, 1790, provides the mode of authentication, and then declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

§ 13. *The act of congress for the authentication of records does not prevent a state from enacting statutes of limitation barring actions on judgments recovered in other states, and declared conclusive evidence by that act of congress.*

The legislation of congress amounts to this,—that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it. This is the whole extent to which congress has gone. As to what further “effect” congress may give to judgments rendered in one state, and sued on in another, does not belong to this inquiry; we have to deal with the law as we find it, and not with the extent of power congress may have to legislate further in this respect. That the legislation of congress, so far as it has gone, does not prevent a state from passing acts of limitation to bar suits on judgments rendered in another state, is the settled doctrine of this court. It was established, on mature consideration, in the case of *McElmoyle v. Cohen*, 13 Pet., 312 (Judg., §§ 1126–30), and to the reasons given in support of this conclusion we refer.

§ 14. *Where the legislature makes no exceptions the courts can make none.*

But the argument here is, that the law of Mississippi carries with it an exception, for the palpable reason that neither party, nor the cause of action, was within the operation of the act for a single day before suit was brought.

1. The act itself makes no exception in favor of a party suing under the circumstances of these plaintiffs. So the supreme court of Mississippi held in the case of *McClintock v. Rogers*, 12 Smedes & M., 702; and this is manifestly true on the face of the act.

2. The legislature having made no exception, the courts of justice can make none, as this would be legislating. In the language of this court, in the case of *McIver v. Ragan*, 2 Wheat., 29: “Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions.” The rule is established beyond controversy. It was so held by the supreme court of New York, in *Troup v. Smith*, 20 Johns., 33; and again in *Callis v. Waddy*, 2 Munf., 511, by the court of appeals of Virginia; and also in *Hamilton v. Smith*, 3 Murph., 115, by the supreme court of North Carolina; and in *Cocke and Jack v. McGinnis*, Mart. & Yerg., 361, in the supreme court of Tennessee. Nor are we aware that, at this time, the reverse is held in any state of this Union. It is the doctrine maintained in *Stowell v. Zouch*, found in Plowd., 353, and not departed from by the English courts, even in cases of civil war, when the courts of justice were closed and no suit could be brought.

In the first place, as the act of limitations of Mississippi has no exception that the plaintiff can set up, and as none can be implied by the courts of justice; and secondly, as the state law is not opposed to the constitution of the United States or to the act of congress of 1790, it is our duty to affirm the judgment. The case of *Dulles, Wilcox and Welsh against Richard S. Jones* (No. 108), being in all its features like the one next above, the judgment therein is also affirmed, for the reasons stated in the foregoing opinion.

HAWKINS v. BARNEY.

(5 Peters, 457-469. 1831.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the circuit court of Kentucky, brought to reverse the decision of that court on a bill of exceptions. The suit was ejectment, by Barney, brought to recover a part of a tract of fifty thousand acres of land, in possession of Mr. Hawkins, within the limits of his patent. Both parties claimed under Virginia patents, of which Barney's was the eldest. The plaintiff below proved a grant to Barbour, and a conveyance from the patentee to himself. The defendant below proved a grant to one May, a conveyance from May to Creemer, and from Creemer to himself. He then proved that Creemer entered into possession under May, in 1796, and resided on the land so conveyed to him, until he sold to defendant below, who has had peaceable possession of the premises ever since, until the present suit was brought, which was May 4, 1817.

This state of facts brings out the principal question in the cause, which was on the constitutionality of the present limitation act of that state, commonly known by the epithet of the seven years' law. The court charged the jury in favor of Barney, and the verdict was rendered accordingly. It is now argued that, by the seventh article of the compact with Virginia, Kentucky was precluded from passing such a law. And that this court has, in fact, established this principle, in their decision against the validity of the occupying claimant laws. I am instructed by the court to say that such is not their idea of the bearing of that decision. On a subject so often and so ably discussed in this court and elsewhere, and on which the public mind has so long pondered, it would be a useless waste of time to amplify. A very few remarks only will be bestowed upon it. The article reads thus: "All private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

Taken in its literal sense, it is not very easy to ascribe to this article any more than a confirmation of present existing rights and interests, as derived under the laws of Virginia. And this, in ordinary cases of transfer of jurisdiction, is exactly what would have taken place upon a known principle of international and political law, without the protection of such an article. We have an analogous case in the thirty-fourth section (1 Stat. at Large, 92) of the judiciary act of the United States; in which it is enacted that the laws of the several states shall be rules of decision in the courts of the United States; and which has been uniformly held to be no more than a declaration of what the law would have been without it; to wit, that the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined.

And yet, when considered in relation to the actual subject to which this article was to be applied, and the peculiar phraseology of it, there will be found no little reason for inquiring whether it does not mean something more than would be implied without it; or why it was introduced if not intended to mean something more. It had an almost anomalous subject to operate upon.

I perceive that in the copy of Littell's laws which has been sent to our chambers, some one has had the perseverance to go over the legislation of

Virginia relating to the lands of Kentucky whilst under her jurisdiction, and to mark the various senses to which the word "rights" has been applied, in the course of her legislation. It is curious to observe how numerous they are. Her land system was altogether peculiar, and presented so many aspects in which it was necessary to consider it, in order to afford protection to the interests imparted by it, that it might, with much apparent reason, have been supposed to require something more than the general principle to secure those interests. So much remained yet to be done to impart to individuals the actual fruition of the sales or bounties of that state that there must have been, unavoidably, left a wide range for the legislative and judicial action of the newly created commonwealth. When about then to surrender the care and preservation of rights and interests, so novel and so complex, into other hands, it was not unreasonably supposed by many that the provisions of the compact of separation were intended to embrace something beyond the general assertion of the principles of international law, in behalf of the persons whose rights were implicated in or jeopardized by the transfer.

Such appears to have been the view in which the majority of this court regarded the subject in the case of *Green v. Biddle*, 8 Wheat., 1, when, upon examining the practical operation of the occupying claimant laws of Kentucky, upon the rights of landholders, they were thought to be like a disease planted in the vitals of men's estate, and a disease against which no human prudence could have guarded them, or at least no practical prudence, considering the state of the country and the nature of their interests. And when again, upon looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the compact.

§ 15. *The legislation of Kentucky, on the subject of land titles and limitation of actions, has been fully in accordance with her compact with Virginia.*

Such, we conceive, are all reasonable quieting statutes. From as early a date as the year 1705 Virginia has never been without an act of limitation. And no class of laws is more universally sanctioned by the practice of nations and the consent of mankind than laws which give peace and confidence to the actual possessor and tiller of the soil. Such laws have frequently passed in review before this court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights? All the reasonable purposes of justice are subserved if the courts of a state have been left open to the prosecution of suits for such a time as may reasonably raise a presumption in the occupier of the soil that the fruits of his labor are effectually secured beyond the chance of litigation. *Interest reipublicæ ut finis sit litium*; and *vigilantibus non dormientibus succurrit lex*, are not among the least favored of the maxims of the law.

It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject. She has in fact literally complied with the compact in its most rigid construction; for she adopted the very statute

of Virginia in the first instance, and literally gave to her citizens the full benefit of twenty years to prosecute their suits before she enacted the law now under consideration. As to the exceptions and provisos and savings in such statutes, they must necessarily be left in all cases to the wisdom or discretion of the legislative power.

It is not to be questioned that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction which must materially affect both legislative and judicial independence. It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws under which A. would be subject to one class of laws, because holding under a Virginia grant, while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government.

§ 16. — *limitation laws, although affecting the right as well as the remedy, are not within the prohibition of the compact.*

If the seventh article of the compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact every law applicable to real estate.

It is argued that limitation laws, although belonging to the *lex fori*, and applying immediately to the remedy, yet indirectly they effect a complete divestiture and even transfer of right. This is unquestionably true, and yet in nowise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law; it existed in a state of nature, and is only modified by society according to the discretion of each community. What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself; and if the state of Kentucky has established the rule of seven years' negligence to pursue a remedy, there can be but one question made upon the right to do so, which is, whether, after abstaining from the exercise of this right for twenty years, it is possible now to impute to her the want of good faith in the execution of this compact.

§ 17. — *analogous rule in Virginia requiring actual possession or "seating" to validate titles.*

Virginia has always exercised an analogous right, not only in the form of an act of limitation, but in requiring actual seating and cultivation.

In the early settlement of the country the man who received a grant of land and failed, at first in three, and afterwards in five years, to seat and improve, was held to have abandoned it; it received the denomination of lapsed

land, was declared to be forfeited (Mercer's Abr.), and any one might take out a grant for it. The last member of the eighth article of this compact distinctly recognizes the existence of the power in Kentucky to pass similar laws, notwithstanding the restrictions of the seventh article, and also the probability of her resorting to the policy of such laws. It restricts her from passing them for six years, and what is remarkable, the protection of this restriction is expressly confined to the citizens of the two states; leaving the plaintiff below, and all others not citizens of Virginia, to an uncontrolled exercise of such a power. Forfeiture is the word used in the old laws, and forfeiture is that used in the compact, and the term is correctly applied, since it supposes a revesting in the commonwealth; and it is remarkable how scrupulously Kentucky has adhered to the Virginian principle in her seven years' law, since the benefit of it is confined to such only as claim under a grant from the commonwealth; thus literally applying the Virginian principle of a revesting in the commonwealth and a regranting to the individual.

Upon the whole, we are unanimously of opinion that the court below charged the jury incorrectly on this point; and if it stood alone in the cause the judgment would be reversed. But as it must go back, there are two other points raised in the bill of exceptions which it is necessary to consider here. The one is upon the sufficiency of the power of attorney executed by John to Robert Oliver, and under which the latter executed a deed to Barney to revest in him the fee-simple of the land. Upon looking into that instrument, we are satisfied that although not professional in its style and form it contains sufficient words to support the deed; and there was no error in the decision of the court as to this point. (a)

§ 18. *Where a deed conveys a body of land and excepts several parcels conveyed to other persons, a trespass charged to have been committed on the land should be shown to be without the limits of the parcels so conveyed to others.*

The other question is one of more difficulty. Upon the face of the deed from Barney to Oliver, and the reconveyance from Oliver to Barney, there are recited several conveyances of parcels of the tract granted to Barbour, to several individuals, and particularly one of eleven thousand acres to one Berriman. The case on which the instruction was prayed makes out that Barney proved Hawkins to have trespassed within the limits of the fifty thousand acres; but it was insisted that he ought also to have proved the trespass to be without the limits of the tract shown to have been conveyed away by himself. On the other side, it was insisted that the *onus* lay on Hawkins to prove that his trespass was within the limits of one of those tracts; and the court charged in favor of Barney.

This we conceive to be no longer an open question; it has been solemnly

(a) The instrument in question was executed at Baltimore, October 12, 1815, and was in the following words: "And further, I do hereby authorize and empower my said attorney to contract and agree for the sale, and to dispose of as he may think fit, all or any of the messuages, lands and tenements, and hereditaments of and belonging to me in any parts of the United States, or held by me in trust or otherwise. And to sell, execute and deliver such deeds, conveyances, bargains and sales, for the absolute sale and disposal thereof, or of any part thereof, with such clauses, covenants and agreements, to be therein contained, as my said attorney shall think fit and expedient. Or to lease and let such lands and tenements for such periods and rents as may by him be deemed proper, and to recover and receive the rents due and to become due therefrom, and to give acquittals and discharges for the same, hereby meaning and intending to give and grant unto my said attorney my full power and whole authority in all cases, without exception or reservation, in which it is or may become my duty to act, whether as executor, administrator, trustee, agent, or otherwise."

decided in a series of cases in Kentucky that the party offering in evidence a conveyance containing such exceptions is bound to show that the trespass proved is without the limits of the land so sold or excepted. 3 Marsh., 20; 6 Litt., 281; 1 Mon., 142.

The only doubt in this case was as to which of the two parties this rule applies, since both, and Hawkins first in order, produced in evidence a deed containing the exceptions. But, whether by the exceptions or by the deed, Hawkins' purpose was answered if he proved the whole land out of Barney. Not so with Barney; for in the act of proving the re-investment of the estate in himself, he proved it to be with the exceptions mentioned, and therefore the rule unquestionably applied to him. From these observations it results that the court below erred in refusing to instruct the jury according to the prayer of Hawkins, to wit, "that if they believed the evidence, the plaintiff Barney had no right of entry when this suit was instituted, and that, unless he showed that the eleven thousand acres recited to be conveyed to Berriman by Barney did not cover the land in question, he was not entitled to recover in that suit. The judgment is reversed and the cause remanded for a *venire facias de novo*.

§ 19. Shortening time—Repeal of exceptions—Obligation of contracts.—It was held that the act of 1872 of Wisconsin, reducing the time within which to commence actions on coupons from twenty to six years and on coupons already due for six or more years to within one year, was unconstitutional and void. *Pereles v. City of Watertown*,* 6 Biss., 79.

§ 20. The statute of limitations in force when the liabilities of defendants were incurred did not bar an action until the expiration of twenty years from the time the action accrued. A statute passed subsequently reduced the limitation. Held, that the latter statute was not unconstitutional as affecting existing rights, a reasonable time having been given for the commencement of an action before the bar was to take effect. Nine months and seventeen days held to be such reasonable time in this case. *Terry v. Anderson*, 5 Otto, 628; 17 Alb. L. J., 14 (§§ 226-29).

§ 21. A legislature has the constitutional power to pass an act repealing an exception contained in a prior statute of limitations. Such an act to be constitutional must allow a reasonable time within which to commence existing causes of action. Thus, where an action of covenant was brought in Illinois to which a plea of the limitation of ten years was put in, and the plaintiffs replied that they were non-residents and had sixteen years within which to sue, and the act of 1837 had repealed the exception in favor of non-residents, it was held that the plea was good. *Lewis v. Broadwell*,* 8 McL., 568.

§ 22. An act extending the time within which to bring actions already barred is not unconstitutional because the creditor lived too far off to take advantage of the extension. So held in an action commenced in Texas on a judgment recovered in Mississippi by a bank in 1840. The action was brought in equity in 1850 by an assignee, as the bank had ceased to exist. The act of the republic of Texas barred actions of debt on contracts in writing after four years. By act of 23d June, 1845, actions on foreign judgments of four years' standing were barred unless commenced within sixty days. The plaintiff lived in Philadelphia, and could not take advantage of the act on account of the slowness of communication. *Bacon v. Howard*,* 20 H. w., 22.

§ 23. The act of 1859 of Kansas, limiting the time within which to bring actions on contracts entered into without the state to two years, is unconstitutional in so far as it does not allow a reasonable time within which to commence actions on existing contracts. So held in an action brought to recover the amount of two notes made in Illinois in 1850 and payable in June, 1851 and 1852, respectively. The action was commenced in March, 1859. The act of 1859 required such actions to be commenced within two years next after the cause of action accrued. *Morton v. Sharkey*,* McCahon, 113.

§ 24. The Illinois statute of 1838-39, "to quiet possession and confirm titles" to land, is not a statute of limitations, but a legislative conveyance, and as such is unconstitutional and void. *Arrowsmith v. Burlingim*,* 4 McL., 489.

§ 25. A state law providing that no action can be maintained in that state upon judgments rendered in other states against persons at the time of such judgment resident in the former, in cases where, by its statute of limitations, the cause of action upon which such judgment is founded would have been barred, is unconstitutional, being in conflict with article IV, sec-

tion 1, of the federal constitution, and the laws of congress in pursuance thereof. Such law affects the right as well as the remedy. *Christmas v. Russell*, 5 Wall., 290.

§ 26. The legislature may shorten the time for the running of the statute of limitations without impairing the obligation of the contract. The only restraint is that a reasonable time must be allowed. *Sampler v. The Bank*, 1 Woods, 529.

§ 27. A statute passed March 16, 1869, requiring suits on contracts made prior to June 1, 1865, to be brought by January 1, 1870, is not unconstitutional. *Ibid.*

§ 28. Statutes of limitation do not "impair the obligation of contracts." *Barker v. Jackson*, 1 Paine, 559.

§ 29. The states cannot pass limitation laws in respect to suits concerning patents. *Read v. Miller*, 2 Biss., 15.

§ 30. Statute of limitations abrogating all remedy upon contracts is void. *Johnson v. Bond*, Hemp., 533.

§ 31. The sixth section of the California statute of limitations of 1863 provides in substance that parties claiming real property under titles derived from the Spanish or Mexican governments, or the authorities thereof, which have not been finally confirmed by the United States or its legally constituted authorities, shall be limited to five years after its passage within which to bring an action for the recovery of the property or its possession; but if the title has been thus finally confirmed the parties shall be subject to the same limitations as though they derived their title from any other source; that is, they shall have five years from such final confirmation. *Held*, that the act is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by act of congress or by judicial decree, survey and patent, and that as to titles thus perfected the ordinary period of limitation must be allowed from the date of their consummation which exists with reference to actions on complete title from other sources. *Montgomery v. Bevans*, 1 Saw., 653.

§ 32. On the 6th day of March, 1869, the legislature of Georgia passed an act providing that all suits of whatever nature, in which the cause of action accrued prior to the 1st day of June, 1865, should be barred, unless brought by the 1st day of January, 1870, the period thus allowed for bringing suits being nine months and fifteen days. *Held*, to be a reasonable period in ordinary cases. *Marsh v. Burroughs*,* 1 Cent. L. J., 125.

§ 33. By the Georgia code, section 2548, an administrator is not liable to suit until one year from the date of his qualification. *Held*, that in computing the time which will bar an action, with reference to these two statutes, the administrator is entitled, first, to the one year's exemption allowed by section 2548 of the code, and that then the creditor of the estate is entitled to the nine months and fifteen days of the act of March 16, 1869, added thereto, in which to bring his suit, although the time within which suit may be brought may thereby be extended beyond the 1st day of January, 1870. *Ibid.*

§ 34. A law the effect of which is to revive a claim barred by the statute of limitations, and consequently extinct, interferes with rights already vested, and for that reason is unconstitutional. *Lockhart v. Horn*,* 1 Woods, 628.

2. *Lex Fori*.

SUMMARY—*The lex fori governs as to statutes of limitation.* §§ 35, 36.

§ 35. All suits must be brought within the period prescribed by the local law of the country where the suit is brought. Where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, the bar cannot be pleaded in a foreign tribunal. Thus, where a suit was brought in Alabama, on a cause of action accrued in Mississippi more than three years before the suit was brought, and the Mississippi statute of limitations barred a recovery, it was held that the statute did not affect the remedy in Alabama. *Townsend v. Jemison*, §§ 37-39.

§ 36. Remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted. A party who seeks the remedy of a court must bring himself within the prescription that limits it. The statute of limitations of the *lex loci contractus* cannot be pleaded in bar of an action on the contract brought in a foreign tribunal. The plea of the statute of the state where the action is brought is good. So held in an action of *assumpsit* brought in Massachusetts on a contract made in New York by parties who resided there until the action was barred by the New York statute of limitations. *Le Roy v. Crowninshield*, §§ 40-47.

[NOTE.—See §§ 48-53.]

TOWNSEND v. JEMISON.

(9 Howard, 407-420. 1849.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This suit has been brought here from the district court of the United States for the middle district of Alabama. The defendant in the court below, the plaintiff here, besides other pleas, pleaded that the cause of action accrued in Mississippi, more than three years before the suit was brought, and that the Mississippi statute of limitations barred a recovery in the district court of Alabama. The plaintiff demurred to the plea. The court sustained the demurrer.

We do not think it necessary to do more than to decide this point in the case. The rule in the courts of the United States, in respect to pleas of the statutes of limitation, has always been that they strictly affect the remedy, and not the merits. In the case of *McElmoyle v. Cohen*, 13 Pet., 312 (JUDGE, §§ 1126-30), this point was raised and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

§ 37. *Actions must be brought within the time limited by the lex fori.*

We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought,—the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's Com. on Col. and For. Laws. They were subsequently cited, with others besides, in the second edition of the Conflict of Laws, 483. Among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151 (§§ 40-47, *infra*), so much relied upon by the counsel in this case.

Neither the learned examination made in that case of the reasoning of jurists, nor the final conclusion of the judge, in opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, *Stare decisis et non quieta movere*, which marked his official career. His language in the case in Mason fully illustrates it: "But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed." Then follows this declaration: "It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect." The error, if any has been committed, is too strongly ingrafted into the law to be removed without the interposition of some superior authority. Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames,

and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligations of contracts, and that statutes of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertain *ad tempus et modum actionis instituendæ* and not *ad valorem contractus*. Williams v. Jones, 13 East, 439; Nash v. Tupper, 1 Caines, 402; Ruggles v. Keeler, 3 Johns., 263; Pearsall v. Dwight, 2 Mass., 84; Decouche v. Savetier, 3 Johns. Ch., 190, 218; McCluny v. Silliman, 3 Pet., 276; Hawkins v. Barney, 5 Pet., 457 (§§ 15–18, *supra*); Bank of the United States v. Donnelly, 8 Pet., 361; McElmoyle v. Cohen, 13 Pet., 312 (JUDG., §§ 1126–30).

There is nothing in Shelby v. Guy, 11 Wheat., 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Bing. N. C., 202, 211; Don v. Lippmann, 5 Cl. & Fin., 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the states of the United States, except by legislative enactment.

We will not enter at large into the learning and philosophy of the question. We remember the caution given by Lord Stair in the supplement to his Institutes (p. 852), about citing as authorities the works and publications of foreign jurists. It is appropriate to the occasion, having been written to correct a mistake of Lord Tenderden, to whom no praise could be given which would not be deserved by his equally distinguished contemporary, Judge Story. Lord Stair says: "There is in Abbott's Law of Shipping, fifth edition, page 365, a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them;—yet how can errors be avoided in such a case, when every day's experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others."

§ 38. *Although all remedies are barred by the lex loci contractus, that bar cannot be pleaded in a foreign tribunal.*

We will now venture to suggest the causes which misled the learned judge in Leroy v. Crowninshield into a conclusion that, if the question before him had been entirely new, his inclination would strongly lead him to declare that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal to repel any suit brought to enforce the debt.

We remark, first, that only a few of the civilians who have written upon the point differ from the rule that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield*, we are not acquainted with it. In every case but one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

We do not find him pressing his argument in *Leroy v. Crowninshield* in the Conflict of Laws in which it might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the Conflict of Laws, stating the law upon the point in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

The point had been examined by him in *Leroy v. Crowninshield* without any consideration of other admitted maxims of international jurisprudence having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the state in which it is established; that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the state; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between states to enforce in the courts of each a particular law or principle. When there is no positive rule affirming, denying or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the state from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the state where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of *The Bank of Augusta v. Earle*, 13 Pet., 519, 589 (Corp., §§ 1123-35); Conflict of Laws, Comity.

From what has just been said, it must be seen, when it is claimed that statutes of limitation operate to extinguish a contract, and for that reason the statute of the state in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether contracts by force of the different statutes of limitation in states are not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and discharging contracts out of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Confl. of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld if the point had been considered in the connection we have mentioned.

We have found, too, that several of the civilians who wrote upon the question did so without having kept in mind the difference between the positive

and negative prescription of the civil law. In doing so, some of them — not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it — were led to the conclusion that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive, or the Roman *usucaptio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst., 556. "*Ad-jectio dominii per continuationem possessionis temporis lege definiti.*" Dig., 3.

Negative prescription is the loss or forfeiture of a right by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst., 560, and 3 Burge, 26.

Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and, from some expressions of Pothier and Lord Kames, it was said: "If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive in every other place as in the place of the contract." And that was said in *Leroy v. Crowninshield*, in opposition to the declaration of both of those writers, that in any other place than that of the contract such a presumption could not be made to defeat a law providing for proceedings upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end. Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

But neither Pothier nor Lord Kames meant to be understood that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favor that he has extinguished and discharged his contract until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but according to the law of that forum it may be pleaded that the debt is presumed to have been paid. And it makes an issue in which the plaintiff in

the suit may show that such a presumption does not apply to his demand; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached, and as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was, in fact, because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case. What we have said may serve a good purpose. It is pertinent to the point raised by the pleading in the case before us, and in our judgment there is no error in the district court's having sustained the demurrer.

§ 39. *Distinction between statutes of limitation which extinguish titles and those which bar remedies.*

Before concluding, we will remark that nothing has been said in this case at all in conflict with what was said by this court in *Shelby v. Guy*, 11 Wheat., 361. The distinctions made by us here between statutes giving a right to property from possession for a certain time, and such as only take away remedies for the recovery of property after a certain time has passed, confirm it. In *Shelby v. Guy*, this court declared that as, by the laws of Virginia, five years' *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defense to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358; and it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though one of limitation, goes directly to the extinguishment of the debt, claim or right, and it is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend., 475; *Confl. of Laws*, 582.

In *Lincoln v. Battelle*, 6 Wend., 475, the same doctrine was held. It is stated in the *Conflict of Laws*, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Ad., 284, and *The British Linen Company v. Drummond*, 10 Barn. & Cres., 903, it is said that, if the French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Don v. Lippmann*, 5 Cl. & Fin., 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the house of lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and others v. Wade*, 17 Ves., 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy and such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under

a deed, will, or other conveyance, into a positive absolute title, against all the world, without exceptions in favor of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 363, 364, ed. 1822. In Tennessee there is an act in some respects similar to the possessory law of Jamaica; it gives an indefeasible title in fee-simple to lands of which a person has had possession for seven years, excepting only from its operation infants, *feme covert*s, *non compotes mentis*, persons imprisoned or beyond the limits of the United States and the territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, ch. 28, §§ 1, 2. So in North Carolina, there is a provision in the act of 1715, ch. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *mala fide*.

We have mentioned those acts in our own states, only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation that such sections are found in statutes for the limitation of actions. It is in fact because they have been overlooked that the distinction between them has not been recognized as much as it ought to have been in the discussion of the point whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the state where they were made, or in the courts of other states, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation.

Judgment affirmed.

LE ROY v. CROWNINSHIELD.

(Circuit Court for Massachusetts: 2 Mason, 151-180. 1820.)

STATEMENT OF FACTS.—*Assumpsit* with the common money counts. The defendant pleaded in bar of the action the statute of limitations of the state of New York, where the contract was made, to which the plaintiffs demurred.

Opinion by STORY, J.

This cause was argued in the fullest manner at the last term and has been held under advisement until the present time, principally from my desire to ascertain, upon a review of all the authorities, whether the question raised at the argument was now open for discussion. I have examined all the authorities cited at the bar (some of which are sufficiently obnoxious to critical commentaries), and if I thought there could be any utility in the task, I should not shrink from the labor of giving them a minute review. But after the ingenuity and learning of the profession have for a half century been exhausted upon the general subject, it would be rashness to expect to throw any new light upon it. In proof of the general principles, therefore, which I shall have occasion to state, I shall content myself with a general reference to the cases cited at the bar, and to those which on a former occasion it became my duty to examine and compare. *Van Reimsdyk v. Kane*, 1 Gall., 371 (Eq., §§ 919-29). I shall comment particularly on those only which press directly on the point now in judgment.

§ 40. *Personal contracts as valid in other countries as in the place where made. Exception.*

Some doctrines are so well established that it would be a mere waste of time to attempt to defend them. It is, for instance, a principle of public law perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation and obligatory force in every other country which they have in the country where they are made or are to be executed. The convenience, nay, the necessities of the civilized and commercial world, rendered it indispensable that this principle should be adopted in the earliest rational intercourse; and it would not be easy to trace a period when it was not tacitly adopted as a pledge of public as well as private confidence. An exception co-eval with the rule itself, and resting on the same foundation, is, that no nation is bound to enforce or hold valid any contract which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the public faith.

§ 41. *Remedies on contracts regulated by lex fori.*

Another rule equally well settled is, that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made. The reason of this rule is extremely obvious. Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation. It is sufficient if it gives to foreigners the same means to enforce their rights as it does to its own citizens. In the emphatic language of Mr. Chancellor Kent, I may say, what shall be the course of its judicial proceedings and the limitations of its process, its prescriptions and its exceptions, are "questions of municipal convenience and public utility, which every government has not only a right to consult, but is bound in duty to promote." *Decouche v. Savetier*, 3 John. Ch., 190, 218. There is no hardship or injustice in refusing to foreigners remedies which do not belong to the genius of the government or its laws, or to repel proceedings or process from its courts which it does not choose to entertain in cases of domestic litigation. There would be danger as well as inconvenience in a different course; and if it were to produce no other ill effect than the necessary consumption of time in attempting to learn a strange and novel jurisprudence, it would be a sufficient public mischief to justify the rejection of it. In many cases, indeed, the form of the remedy is perfectly immaterial. The same contract which at Rome demanded a *condictio indebiti* or an *actio certi* might well sustain an action of *assumpsit* or bill in equity in England, a suit by petition in France, or an action of debt in some parts of our country; and each remedy might well be deemed a satisfactory redress. And even where the remedy is more intimately connected with the right, as in the process of execution, there is no absolute reason why a nation should either by arrest of person or property give more prompt efficiency to a contract than its own citizens can claim, or its general laws justify.

§ 42. *He who seeks the remedy must bring himself within the prescription that limits it.*

To another position (which is but a corollary from what has been already stated) I also unhesitatingly accede, and that is, that as the *lex fori* ought to

regulate the remedy, so the party who seeks that remedy must bring himself within the prescription that limits it, and if he does not, that the prescription is not merely a legal but a just bar to his suit. A question may very naturally arise, whether the prescription, within the intent of the statute, applies to foreign contracts; because, as Lord Kames justly observes, "many cases come under the words of a statute that are not comprehended under its spirit and intendment." But when this is undisputed, the conclusion to which his lordship comes seems irresistible, "that every case that comes under our law must be decided by that law and not by the law of any other country." Kames, *Prin. of Equity*, p. 364, § 6; *Ersk. Inst.*, b. 3, tit. 7, § 48, p. 633. The earliest case to be found on this point in the English courts is *Dupleix v. De Roven*, 2 Vern., 540, where to a bill for a discovery of assets and satisfaction of the plaintiff's debt, which was contracted in Rome, the English statute of limitations was pleaded, and by the lord keeper was allowed as a good bar, and again upon a rehearing the decree was confirmed. 2 Vern., 541; Raithby's Note, 3. The doctrine recognized by this case has never since been departed from in England; it has been recognized in the most solemn manner in the state and federal courts in the United States; and though civilians have differed respecting it, it stands approved by the concurrent testimony of the ablest of foreign jurists and courts. *Williams v. Jones*, 13 East, 439; *Nash v. Tupper*, 1 Caines, 402; *Hubbell v. Condrey*, 5 Johns., 132; *Pearsall v. Dwight*, 2 Mass., 84; 1 Emerig. Ass., ch. 4, § 8, p. 120; Huberus, *de conflictu legum*, tom. 2, lib. 1, tit. 3, p. 538; Voet ad Pand., lib. 44, tit. 3, § 12, tom. 2, p. 877; Caseregis, disc. 129, § 58; id., 130, § 33; *Erskine's Inst.*, 633, § 48; Kames on Equity, 363, § 6. Nor was it the intention of the court in the remark cited at the bar from the case of *Van Reimsdyk v. Kane*, 11 Gall., 371, 376 (Eq., §§ 919-929), to question the propriety of those decisions, so far as they gave effect to the law of prescription of the place where the suit was instituted, but merely to state historically the point of debate and to intimate a doubt whether the repelling of the *foreign prescription* in such a case fell within the principle on which the former was justly founded. This is the very point now in controversy, and to the consideration of it the attention of the court will now be directed.

It is agreed by the demurrer that the original contract in this case was made and the cause of action accrued in New York, between the parties to the suit, who were then citizens of that state, and that the statute of limitations of that state would be a good bar to the suit if now brought in any court of that state. In the language of the civil law this temporal prescription would be a sufficient exception to repel the suit. It is not stated in the plea that the cause of action had accrued more than six years before the defendant ceased to be a citizen of New York, so that the statute would have completely run against the plaintiff and extinguished his remedy there, which would certainly have presented a much stronger case and of more serious difficulty. And the question, therefore, is, whether the statute of limitations of New York can now be pleaded in this court as a good bar or defense to the suit.

§ 43. *A plea of the statute of limitations of the loci contractus is no bar to a suit in a foreign tribunal.*

In considering this question it is material to observe that it is not a case where the remedy is partially taken away and partially remains, as where it is extinguished as to the person and retained as to the future effects of the debtor. Such are cases arising under insolvent laws of our own and foreign

states, which discharge the debtor from imprisonment but leave the contract with its full obligation upon his future estate. Such, also, is the effect of the *cessio bonorum* of the civil law and of analogous proceedings of most foreign countries deriving their jurisprudence from the civil law. 1 Domat, lib. 4, tit. 5, § 1, p. 495; Heineccius ad Pand., pars. vi., § 252; 3 Huber., lib. 42, tit. 3, p. 1453; Voet ad Pand., lib. 42, tit. 3, § 3, p. 799; Erskine's Inst., b. 4, tit. 3, §§ 26, 27; Code de Commerce, lib. 3, tit. 2, art. 563; Pothier, Pand., tom. 3, lib. 42, tit. 3, § 2, p. 175; Bruni de cessione bonorum, Quest. 3, Straccha. 868. In this class of cases it has been uniformly decided that as the discharge does not touch the right under the contract, but merely removes one local remedy, leaving all others in force, there is no ground to relieve the defendant from the effect of any process issuing according to the law of any foreign country where he may be sued. Some of the cases cited at the bar turned upon this distinction. Wright v. Paton, 10 John., 300; James v. Allen, 1 Dall., 188; White v. Canfield, 7 John., 117; Sicard v. Whale, 11 John., 194; Peck v. Hozier, 14 John., 346. The doctrine that a remedy against the person may well be maintained upon a contract in a foreign forum, although it would be denied in the place where the contract is made, stands upon analogous reasoning. It was attempted to be shaken in the case of Melan v. Fitz James, 1 Bos. & Pull., 138, where circumstances of hardship seemed to have had great influence with the court; but that case stands alone, and the general doctrine is now unequivocally established. Imlay v. Ellefsen, 2 East, 455.

§ 44. *Extraterritorial operation of the laws of a country.*

It must be admitted as a general proposition that the laws of one country cannot in themselves have any extraterritorial force; and whatever force they are permitted to have in foreign countries must depend upon the comity of nations, regulated by a sense of their own interests and public convenience. Green v. Sarmiento, 1 Pet. C. C., 74; Kames' Princ. of Eq., b. 3, § 6, pp. 363, 364; Caseregis, Disc., 130; 2 Hub., lib. 1, tit. 3; De conflictu legum, §§ 2, 3. But the same reasons which have conduced to the establishment of the rule that personal contracts shall have the same validity in every other country as in that where made have ingrafted upon that another rule, that the same law which creates the charge is to be regarded if it operate a discharge of the contract. Green v. Sarmiento, 1 Pet. C. C., 74; Kames' Princ. of Eq., b. 3, § 6, pp. 360, 364. From the very terms of these rules it necessarily follows that they exclude all cases where the discharge set up is derived from the local laws of a state where the contract was not made. Hence it has been held that a discharge from the debt under the bankrupt laws of the place of the contract is good in every other place when pleaded as an extinction of the debt. Ballantine v. Golding, Cooke Bank. Law (6th ed.), 500; Smith v. Buchanan, 1 East, 6; Potter v. Brown, 5 East, 124; Hunter v. Potts, 4 T. R., 182; Emory v. Grenough, 3 Dall., 369; Smith v. Smith, 2 John., 235. And, on the other hand, that a like discharge under the laws of any place where the contract was not made cannot be so pleaded in the tribunals of any other nation. Bradford v. Farrand, 13 Mass., 18; Hicks v. Brown, 12 John., 142; Quin v. Keefe, 2 H. Bl., 553; Blanchard v. Russell, 13 Mass., 1; Walsh v. Farrand, 13 Mass., 1; Van Raugh v. Van Arsdaln, 3 Caines, 154; Smith v. Smith, 2 John., 235; Proctor v. Moore, 1 Mass., 198. Many of the cases cited by the plaintiff's counsel rest on this foundation, and in this view are susceptible of the most satisfactory vindication.

It is very certain that discharges under bankrupt acts are not the only ex-

exceptions or bars founded on local laws which are held good in every foreign tribunal. From the reason of the thing many other local defenses must be held of equal validity. Chief Justice Parker, in his very elaborate opinion in *Blanchard v. Russell*, 13 Mass., 1, lays it down as a rule affecting all personal contracts, that they are subject to all the *consequences* attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject or resident in that country where it is entered into, and no provision is introduced to refer it to the laws of any other country. He excepts from the rule cases where the laws sought to be enforced are unjust or injurious to our own citizens. Within the terms of the rule thus laid down, a bar of the statute of limitations would be included, for it is a consequence attached to the contract in the place where it is made. I am persuaded, however, that this case was not at the moment in the mind of the learned judge, and that the language used by him ought to be interpreted with reference to the case of insolvency, which was then before him. Emerigon lays down a rule somewhat more precise. He says: "Pour tout ce que concerne l'ordre judiciaire, on doit suivre l'usage du lieu où l'on plaide. Pour ce qui est de la décision du fonds on doit suivre en règle générale les lois du lieu où le contract a été passé." He then cites a passage from the civil law, "*ex consuetudine ejus regionis, in qua negotium gestum est;*" and then adds, "*cette distinction est consignée dans nos livres.*" In his *quæ respiciunt litis decisionem servanda est consuetudo loci contractûs.* At in his *quæ respiciunt litis ordinationem attenditur consuetudo loci ubi causa agitur.*" 1 Emerigon, ch. 4, § 8, p. 122. It has been supposed that by the expression, "la décision du fonds" (literally the decision of the grounds or essential points of the suit), Emerigon meant the decision upon the "merits" of the suit. If by "merits" he intended a defense founded in general justice, or going to the essence and obligation of the contract in contradistinction to a defense standing upon the text of positive law, it appears to me that the interpretation is too narrow. But if by a decision upon the "merits" be intended a defense forming a perpetual bar of the suit, in contradistinction to a mere dilatory or temporary plea, such as a plea in abatement, there is no reason to contest the interpretation. It appears to me that Emerigon uses the expression in this latter sense as equivalent to the phrase, "*litis decisionem,*" which obviously embraces any defense forming a perpetual bar to the suit. 1 Emerigon, ch. 4, § 8, pp. 125, 126. In this view it would embrace statutable bars such as that of prescription or the statute of limitations, as well as those resting on the general nature and conditions of the contract.

Take the case of a former judgment between the parties upon the same subject-matter of contract. If the plaintiff again attempt to sue upon the same contract in a foreign court, would not the *exceptio rei judicatæ* in the domestic court be a good bar for the defendant? I take it to be generally admitted as a conclusive bar to repel a new suit in a foreign country, whatever may be the differences among nations as to the conclusiveness of foreign judgments in a suit brought to enforce them. Kames on Equity, ch. 8, p. 369; Ersk. Inst., b. 4, tit. 3, § 4, p. 300; Pothier on Oblig., pt. 3, ch. 8, art. 1, § 640; id., pt. 4, ch. 3, § 3, arts. 1, 2, 3, § 37. If we suppose that the judgment in the domestic forum was given upon a statutable bar, specially pleaded, as upon the statute of limitations, then we have a case in which, under the shape of an *exceptio rei judicatæ*, the domestic prescription is enforced in a foreign forum. But it has been said that the bar of *rei judicatæ* is admitted to be conclusive

in all foreign courts upon the ground of public utility, because there should be some means to put a final issue to controversies, otherwise litigation would be perpetual. Kames' Equity, ch. 3, p. 369. This is certainly true; and it is curious enough that the decisions stop far short of the principle, for foreign judgments of dismissal of suits are held conclusive, and no evidence is admitted to contradict them; and so of other judgments set up as bars to new suits; but if a former judgment is sought to be enforced by a new suit, it is no longer conclusive in favor of the plaintiff. The principle, too, of the conclusiveness of the exception of *rei judicatae* applies to statutes of limitation. They are emphatically called statutes of repose, made to cut off stale demands, and to shelter parties from fraudulent claims after a long lapse of time, when the evidence is no longer within their reach. In their very theory they purport to afford positive presumptions of payment and extinction of contracts according to the laws of the place where they are made. Pothier says, although pleas in bar (of prescription) do not extinguish the claim in *rei veritate*, yet they cause it to be presumed to be extinguished and discharged, while the plea in bar exists. "Outre cela quoique les fins de non-recevoir n'éteignent pas in rei veritate la creance, néanmoins elles la font présumer éteinte et acquittée, tant que la fin de non recevoir subsiste." And he puts a strong case, where in a suit brought he admits that a claim so barred cannot be a set-off, and gives the reason "car la fin de non recevoir que subsiste contre ma creance opere la presumption de l'extinction de ma creance." Pothier, Oblig., pt. ch. 8, art. 1, §§ 677 (642). He adds, also, that from the principle that the plea in bar while it subsists causes the claim to be presumed to be extinguished, it follows, also, that one would *ineffectually become a security* for a claim which is already barred. Kames, Eq., ch. 8, § 6, pp. 363, 364; Ersk. Inst., b. 3, tit. 7, § 48, pp. 633, 634; Voet ad Pandect, lib. 44, tit. 3, § 10. This presents the nature of the presumption in a strong light, and other distinguished jurists admit the same reasoning. Kames, Eq., ch. 8, § 6, p. 364.

Lord Kames says, "when a process is brought in Scotland for payment of an English debt after the English prescription has taken place, it cannot be pleaded here that the action is cut off by the statute of limitations; but it can be pleaded here, and will be sustained, that the debt is presumed to have been paid. Considering that the statute can have no authority here except to infer a presumption of payment, it follows that the plaintiff must be permitted to defeat the presumption by positive evidence, or to overbalance it by contrary presumptions, or to show from the circumstances of the case that payment cannot be presumed." Kames, Eq., ch. 8, § 6, p. 364. Now, in the first place, if the statute of limitations does create *proprio vigore* a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment thus arising from the *lex loci contractus* should not be as conclusive in every other place as in the place of the contract. It may be admitted that it might be repelled by any circumstances which would constitute a good replication to the bar in the country of its origin. But why the parties should be permitted to escape from the conclusiveness of the presumption of payment which their own laws have made, simply because they are in a foreign country, requires some further explanation. Payment or extinction, according to the laws of the place of contract, is payment or extinction of the debt everywhere. Why not, then, the presumption of payment or extinction conclusive everywhere else when it would be conclusive at home? Why should a difference be made between the fact and

that which the law deems conclusive evidence of the fact? What is there in the principles of national comity which forbids us to bind the parties by a rule or a prescription which the laws of their country have made conclusive between them? If a foreign prescription may be given in evidence as proof of payment, why may it not be pleaded directly as a positive bar?

It is certain that what would be evidence of a contract in the place where it is made is admissible to prove it, although contrary to the local regulations of the forum where it is sought to be enforced. Emerigon puts a case in point. Two Englishmen litigated in a cause pending in France; the one prayed to be allowed to prove by *witnesses* the loan of a sum exceeding one hundred livres; the other excepted against it the fifty-fourth article of the ordinance of Moulins. It was adjudged by the parliament of Paris that the ordinance did not apply, inasmuch as it goes *ad litis decisionem*. Emerigon considers this question as to proof as “pour la décision du fonds,” and therefore “on se réglera par les loix du lieu du contrat,” it is to be regulated by the laws of the place of the contract. 1 Emerigon, ch. 4, § 8, pp. 125, 126. If the article of Moulins had been incorporated into the English law, the objection would have been fatal. Why? Because the law of the place had made it indispensable as evidence of the contract in its original concoction? Why not then apply the same rule as to statutes, which conclusively presume the extinction of the contract?

But it is argued, and has often been argued, that statutes of limitation belong to the regulations of process in every state, and limit the judicial order of proceedings in their courts. To use the expression of Emerigon, they are said to belong “à l'ordre judiciaire.” This is true as to such statutes regulating remedies exclusively in the courts of a state. But is this the whole effect of such statutes generally? Is this the whole effect of statutes of limitation, purporting on their face to extinguish all right of action in perpetuity, upon contracts made in a country, without reference to any particular court, in which the action may be brought? Statutes of limitation may be so framed as merely to apply to the jurisdiction of a court. They may prohibit such court from taking cognizance of an action, unless brought within a limited period after the right has accrued. Such statutes properly and emphatically belong to the regulation of judicial proceedings. Statutes of limitation may, on the other hand, declare, in terms, that contracts not sued for within a limited period shall be held to be utterly extinguished. Such statutes are a complete extinguishment or discharge of a contract, and constitute a universal bar, as much as a discharge under a bankrupt law. Such statutes constitute bars *ad litis decisionem*; they go *à la décision du fonds*. Statutes of limitation may proceed in an intermediate course. They may declare that no action shall be brought upon contracts made within a state, unless within a limited period. In this last case, if they are directory to courts of justice, as to the sustaining of suits, they are properly deemed a regulation of the judicial proceedings in such courts. If, on the other hand, they are considered as defenses or bars, authorized to be made by the debtor and at his option, they are no otherwise a regulation of judicial proceedings than any other legal bar set up by the debtor. They authorize a judgment of the court in his favor, as a perpetual bar of any suit. They literally go, therefore, *ad litis decisionem*. Now the prescriptions of the French law are pleas in bar, which ought to be pleaded by the debtor, and the court cannot supply them (Pothier, Oblig., pt. 3, ch. 8, art. 1, § 679); and, in general, the same is true as to our statutes of limitation of personal contracts. They must be pleaded by the debtor, otherwise

they are not available in his favor. These are, in my view, important distinctions, which have not hitherto sufficiently attracted attention. The defense, in such case, is given to the debtor against any action after the limited period. When that period is passed, if the parties are still within the state, all right of action is extinguished; and I can perceive no reason why the right to use that defense, good by his own laws, should not travel with the debtor into every other country. The policy of it is as strong as that of the rule of the *exceptio rei judicatæ*. It is to put an end to litigation, and to save persons from continual exposure to stale demands.

§ 45. *The statute of limitations as it affects contracts as to right and remedy.*

The leading argument against this doctrine, however, is that statutes of limitation extinguish the *remedy* only, and not the *right*, upon contracts. Let us not deceive ourselves; there is no magic in words. Is the proposition, thus laid down, true to the extent which the purpose for which it is introduced requires? The distinction between a *right* and a *remedy* is admitted. But can a right be truly said to exist upon a contract when all remedy upon it is legally extinguished? Suppose a judgment has passed upon the plea of prescription to a contract in favor of the defendant; there is a perpetual bar of remedy, but could it be said that the *right* upon the contract still subsists? The supreme court of the United States has recently said, in a very elaborate opinion delivered by the chief justice, "the distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." Again: "Statutes of limitation relate to the remedies which are furnished in the courts. They rather establish that certain circumstances *shall amount to evidence that a contract has been performed* than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence not barred by the statute should be construed to be within it, there would be little doubt of its unconstitutionality." *Sturges v. Crowninshield*, 4 Wheat., 122, 200, 207 (Const., §§ 1937-39). And why, may it be asked? Because it takes away all remedy upon the contract and thereby destroys its obligation.

In the opinion of the supreme court in the case then in judgment, the insolvent laws of states which absolved the person and future property of the debtor from the contract impaired its obligation and were therefore unconstitutional. A statute, therefore, that takes away all remedy upon a contract cannot be truly said not to affect the right or obligatory force of such contract. What is the right of a contract when the remedy is extinguished in perpetuity? That a debt, barred by the statute of limitation, is not so utterly gone as that it may not be revived by a new promise is admitted. And in this respect it is exactly in the same predicament as a debt discharged by a certificate of bankruptcy. The right is just as much extinguished in the one case as in the other and no more. Indeed, a discharge in bankruptcy is but an extinction of all future remedy against the person and effects of the debtor. Pothier, alluding to the bar of prescription, says that it does not extinguish the debt, but it renders it ineffectual by not permitting the creditor to bring the action which results from it; that, while it subsists against any debt, it operates as a presumption of the extinction of the debt; but he adds that payment by the debtor is, notwithstanding, valid, since the debt is not extinguished. Pothier,

Oblig., pt. 3, ch. 8, art. 1, § 676. It is obvious from the whole scope of the observations of Pothier that he means no more than that the prescription does not extinguish the claim if the debtor does not interpose it as a bar; and that a voluntary payment cannot be recovered back, since it is but a waiver of the bar which the debtor had a right to plead. Strictly speaking, in Pothier's view, a prescription is not *per se* an extinction of the remedy, but only at the option of the debtor. He asserts that the plea of prescription ought to be interposed by the debtor and cannot be supplied by the judge. Pothier, Oblig., pt. 3, ch. 8, art. 1, § 676. This is perfectly reasonable, and conforms to the doctrine of the common law as to the like plea in personal actions. Every one is at liberty to waive a rule or law introduced for his benefit.

The distinction which is here alluded to, between the *absolute* extinction of a debt and the *positive* presumption of its extinction which the law allows to the debtor, and which becomes absolute when the prescription is pleaded by him, is just in itself. It proceeds upon the ground, not of a strict *legal right* in the creditor, which he may enforce against the will of the debtor, but upon the notion that there still exists, notwithstanding the statutable prescription, a moral obligation binding in *foro conscientiæ*; which, if recognized by the debtor or discharged by him, repels any imputation that the transaction is a *nude pact* without consideration. Payment, therefore, by the debtor, once made, cannot be recalled, for it is an equitable and honest act and founded in moral obligation. But still there is not, strictly speaking, any right in the creditor to claim payment, for the law has made the bar, if pleaded, an estoppel of the right. Such right is technically extinguished in contemplation of law by the presumption of extinction, until the debtor himself negatives the presumption by some act or admission. This view is not opposed by Voet, or D'Aguesseau, in the passages cited at the bar. Voet says: "Prescriptioni effectus est, quod jure Romano naturalem obligationem extra omnem juris effectum constituat, licet eam non tollat ipso jure. Unde et obligationi ita prescriptæ regulariter neque fidejussor nec pignus accedere potest. Quod ipsum jus de non admittendis pro debito præscripto fidejussoribus aut pignoribus, moribus hodiernis magis obtinet, quia placuit, per præscriptiones ipso jure perimi, quæ subfuerant, obligationes." Voet ad Pand., lib. 44, tit. 3, § 10. Now there can be no legal right where the natural *obligation* of the contract is gone, or is without any effect. D'Aguesseau observes, "Toute prescription suppose deux choses; l'une que celui, que prescrit, demeure defendant débiteur du droit, qui'l veut éteindre par la prescription; l'autre, que celui, contre lequel on prescrit, est en état d'agir et d'interrompre la prescription." D'Aguesseau, *ouvr. de* tom. 5, p. 374. The learned author certainly admits that the prescription *extinguishes the right* if the debtor avails himself of it; and that the creditor is only in a situation to defeat the prescription if the debtor does not use it.

It is plain, therefore, that when the *remedy* is said to be extinguished by a prescription, and not the *right*, we are not to understand the term "right" in its technical legal sense, but merely as a moral obligation and claim in natural justice. In the common law a right always supposes some mode by which it can be enforced. It may be by action, or by entry or retainer. But it is always contemplated by law that there is some mode by which it may *legally* be enforced. Generally speaking, it is used as a phrase less extensive than that of *title*; and is applied to cases where a right of action subsists. Co. Litt., 345, a. b.; Sheppard's Epitome, Droit, p. 466. A person's estate is there-

fore often said to be turned to a right when it can be recovered only by an action, as in cases of descents after a disseizin, where, as Lord Coke says, *jus descendit et non terra*. Co. Litt., 345, b. And I am not aware that in any exact legal sense a right can be said to subsist upon a contract where the law has taken away all the power of enforcing its obligation by any remedy.

The cases already cited, with reference to the effect of discharges under laws of insolvency and bankruptcy, proceed upon this distinction. Where the insolvent laws merely discharge the person, leaving the effects, future as well as present, liable for the debt, the discharge cannot be pleaded as a bar to any action in a foreign court. The reason is that there remains some *remedy*; there is not a total, but a partial extinction of remedy; it is gone *in personam*, but not *in rem*. But where the effects, as well as the person, are discharged, as in cases of bankrupt laws, there the discharge is held a universal bar; and the reason is that it extinguishes *all remedy* of every kind, and consequently, in a legal and exact sense; all *right*. Now it seems to me that the doctrine here proceeds upon a plain principle. Where the *lex contractus* leaves any right of action, foreign courts may enforce that right according to their own local remedies and modes of proceeding. Where no right of action subsists by the *lex contractus*, foreign courts do not enforce the original obligation, because it is gone, and to enforce it would be to *create* a new obligation, and not to recognize a subsisting one. Now this is precisely the case in respect to statutes of limitation of the *lex loci contractus*, where they have actually and completely run against a contract. The laws extinguish the remedy in every form, at the option of the debtor; and this right or presumption of extinction ought to go with him everywhere, and to be recognized everywhere. If it be said that the remedy being gone does not by the *lex loci* extinguish the right, I would ask how that position is made out. It is precisely like the case of bankruptcy. The bar in the latter case is a more positive bar; it does not and cannot suppose a real satisfaction of the debt, for then payment might be pleaded. The contract may be revived by a new promise, and it rests in the option of the debtor to plead it or not. It runs, therefore, in a perfect parallel with the case of the statute of limitations; and is not distinguishable from it, except that in the one case all remedy is extinguished after the lapse of a certain time, and in the other, *immediately* upon the operation of the law upon the case of bankruptcy. The doubt which I ventured to throw out in the case of *Van Reimsdyk v. Kane*, 1 Gall., 371 (Eq., §§ 919-29), as to the distinction between them, asserted by the current of authorities, still remains with me; and I am not yet able to perceive that the distinction is in principle sound.

The doubt which still presses on my mind, and the reasoning which has been suggested in aid of that doubt, are not without countenance from civilians, and seem at least, in times past, to have divided their opinions. I do not know that Casaregis has given any express opinion. After having adverted to the common distinction between the construction of contracts, and the mode of proceeding judicially to enforce them, he says, "*cui distinctio adstipulatur altera, quod, aut disseritur de qualitatibus et conditionibus contingentibus in ipso contractu et tempore contractus, prout in presenti, et tunc inspicendus sit locus contractus; aut de qualitatibus contingentibus post contractum ex negligentis vel mora et tunc inspicendus sit locus, ubi illa mora contracta est.*" Casaregis, Disc., 179, § 60. It is not quite clear what defense or delay, which should bar the right, is here alluded to; but he seems to consider gen-

erally, that if by such negligence or delay the contract be once gone by the *lex loci*, it affects the contract everywhere. There is certainly an obscurity in the phraseology, which does not permit us to reason with perfect certainty as to his views. Domat says, "a creditor loses his debt for having omitted to demand it within the time limited by prescription, and the debtor is *discharged* from it by the long silence of his creditor." 1 Domat, b. 3, § 4, art. 1, p. 464, Straban's translation, ed. 1737. And again, "there is yet another use of prescription, in which possession is not necessary, which is that of *annulling the rights and actions* which one has ceased to exercise during a time sufficient for prescribing. Thus a creditor *loses his debt, and all rights and actions are lost*, although those who are debtors possess nothing, if a demand is not made of the debt, or if one ceases to exercise his *right* during the time regulated by law." 1 Domat, b. 3, § 4, art. 10, p. 466, *ibid.* This language is exceedingly strong and direct, and shows that Domat contemplates that the *right* to the debt in a legal sense is lost by the prescription, and this not in a particular place, for he annexes no qualification, but generally; in other words, that it is legally discharged. Erskine, in his Institutes (Erskine, Inst., b. 3, tit. 7, § 48, edit. 1812), says: "if in the case of an English debt, which is in their law limited to a short prescription, but not in ours, an action shall be brought in Scotland, by the creditor, for payment after the years of the English limitation shall have elapsed, the English statute, which is of no proper authority in the courts of Scotland, cannot be regarded as an extinction of the claim. Nevertheless, it ought in equity to be regarded as a presumption that the debt is paid, if the creditor shall not elude it either by direct evidence or contrary presumptions. *It is hard to quote any decisions of our supreme court, in support of what has been observed on this head, to which contrary decisions may not be opposed.* But these and other rules relating to it are laid down with great precision, and the contrary judgments censured by the author of the Principles of Equity. Kames, Eq., b. 3, ch. 8, § 6. By the latest decision, the court of sessions "have made the law of Scotland the rule of their judgment." Thus far the text. And the editor of the last edition states, "the same has since been repeatedly found," and cites the cases. It is to be observed, however, he adds, that in all these cases the debtor had left England *within the period of the statutory limitation*, so that the court had no other rule than the Scots' prescription to go by. In two still later cases, in 1786 and 1792, which he cites, the *Scots' prescription was finally overruled*. So that it would seem by the latest Scotch decisions, the prescription of the *lex contractus*, and not that of the *lex fori*, is now the established rule. After such a variety of fluctuating decisions at a bar and bench so distinguished for learning and talent and discrimination as those of Scotland, one may venture to maintain that all reasoning and principle are not necessarily on one side of this question without the imputation of extreme rashness of assertion.

§ 46. *Views in opposition to the established rule.*

If, therefore, the question were now entirely new, and I were called upon to settle it upon principle, I confess that the inclination of my own mind would strongly lead me to adopt the following propositions: 1. That wherever a right to a debt exists by the *lex loci contractus*, although a remedy in *personam* be taken away, that right may be enforced in a foreign tribunal by any remedy which its own modes of judicial proceeding authorize, and exclusively by such remedy. 2. That where all remedies are barred, or discharged by the *lex loci contractus*, and have operated on the case, there the bar may be

pleaded by the debtor in a foreign tribunal to repel any suit brought to enforce the debt. 3. That where all remedies are barred by the *lex loci contractus* there is a virtual extinction of the *right* in that place, which ought to be recognized in every other tribunal as of equal validity. 4. That if the prescription by the *lex loci contractus* be longer than that of the *lex fori*, the latter may be pleaded in bar to a foreign contract if it applies to foreign contracts; and that this does not on principle suppose that the foreign prescription may not also be a well-founded bar to the suit.

But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed.

It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect. The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority. Besides the incidental recognitions already referred to in other writers, Huberus and Voet speak strongly on the point. The former puts this example: "*Frisius in Hollandia debitor factus ex causâ mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit præscriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi præscriptionem non esse receptam, proinde sibi non ob stare in hac causâ. Sed aliter judicatum est, etc. Ratio hæc est, quod præscriptio et executio non pertinet ad valorem contractus sed ad tempus et modum actionis instituendæ, etc.*" 2 Huberus, lib. 1, tit. 3, § 7, p. 540. It is true that Huberus here applies his doctrine to the case of a prescription of the *lex fori* (as to which I entirely agree with him); but it is apparent from the whole scope of his reasoning in his celebrated chapter *de conflictu legum* that he meant to exclude the application of the prescription of the *lex loci contractus*. Voet is more direct: "*Si præscriptioni implendæ alia prefinita sint tempora in loco domicilii actoris, alio in loco ubi reus domicilium fovet, spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur.*" Voet ad Pand., lib. 44, tit. 3, § 12. He does not put the case of the prescription of the place of the contract, but of the plaintiff's domicile; but it is fairly to be presumed that he supposed them to be in the same predicament. Lord Kames, as we have already seen, asserts the doctrine in the most explicit manner. These opinions are certainly of great weight, and probably indicate the doctrine predominating among civilians. We may now look to the decisions at the common law. In the case of *Williams v. Jones*, 13 East, 439, the question was directly made at the bar. Lord Ellenborough, in pronouncing judgment, advert ing to the argument, said, "It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they so contracted; and, generally speaking, that is so; that is, if the rights of the contracting parties be extinguished by the foreign law upon the happening of certain events. But here, there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority for saying that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy

here also. If it go to the extinction of the right itself, the case may be different." The case, however, finally turned upon another point, viz., that it was within the saving of the statute of limitations. But the general doctrine stated by Lord Ellenborough is fully recognized by all the other judges, and puts an end to the question, at least in England.

Then come the decisions in our own courts. One of the earliest cases is *Nash v. Tupper*, 1 Caines, 402, where, to an action on a note, the plea of the statute of limitation of six years of New York (where the suit was brought) was pleaded, and the plaintiff replied that the contract was made in Connecticut, where the limitation was seventeen years. Upon demurrer to the replication, the court held it bad, and the plea in bar good, and referred to an earlier case where the same point was decided. Mr. Justice Livingston dissented from this judgment in an opinion expressed in his usual clear and forcible manner, and illustrated his views on the general question with a cogency of argument and learning which in my humble judgment are not easily answered. This decision was confirmed in *Ruggles v. Keeler*, 3 John., 263, and the point directly adjudged, that the statute of limitations of a foreign state could not be set up as a bar to a set-off founded on a contract executed in a foreign state. The facts were special, and did not necessarily require a decision of the point in its most general shape. The action was on a note given by the defendant to the plaintiff Keeler (as it should seem in Connecticut); it was not negotiable, but was assigned to one Walker, in Connecticut, and there certain services were performed, and goods sold, by the defendant to Walker, while he was owner of the note. The suit was brought in the plaintiff's name, for the benefit of Walker. It was, therefore, a case where the set-off might be justly considered as intended by the parties as an equitable concurrent discharge of the note. It fell, therefore, precisely within the doctrine asserted by Pothier. "If," says he, "my debtor of a sum of money, before the time of the prescription against my claim was accomplished, and consequently before the plea in bar was acquired, had become my creditor of a like sum of money, and afterwards, since the time of prescription against my claim was accomplished, should demand the payment of his, although I should not be allowed to bring an action against him for mine, I should be allowed to oppose it to him as a set-off (compensation) against his. This is according to the maxim of the doctors, 'quæ temporalia sunt ad agendum perpetua sunt ad excipiendum.' The reason is, that the set-off (compensation) is made of full right from the time that your claim and mine, which was not yet prescribed, were mutually set off and extinguished." Pothier, *Oblig.*, part 3, ch. 3, art. 1, § 677. However, the court decided the question upon the broad ground, stating that statutes of limitation are municipal regulations, founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. Mr. Chancellor Kent has in a very recent case sustained and explained the reasoning of this decision in a very elaborate manner, and has pressed into its service, with his accustomed diligence, a mass of exact authority. *Decouche v. Savetier*, 3 John. Ch. R., 190, 213, etc.

The case of *Pearsall v. Dwight*, 2 Mass., 84, decided by the supreme court of Massachusetts, is directly in point. There the defendants pleaded the statute of limitations of New York to a contract made in New York. The court held the plea bad; and Chief Justice Parsons (himself a great authority), in

delivering the opinion of the court, said, "the law of the state of New York will therefore be adopted by the court in deciding on the nature, validity and construction of this contract. This we are obliged to do by our laws. So far the obligation of comity extends, but it extends no farther. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed *exclusively* by the laws of this commonwealth."

§ 47. *The question in the case is settled by the authorities.*

It appears to me that these authorities are too stringent and obstinate to be easily resisted. I confess myself unable to resist the conclusion that they demonstrate the present question to be entirely at rest in the principal state tribunals where the parties dwell, and by whose laws they are to be governed. I feel myself, therefore, constrained to say that the plea in bar is bad and must be overruled.

There is another objection to the plea (independent of the general ground) which has been already alluded to, and which, if that ground were untenable, might well induce a question of the validity of the plea. It is that the statute of limitations of New York does not appear to have run against the action while the parties were citizens of that state. But it is unnecessary to dwell on this objection, as the plea cannot otherwise be sustained.

Plea adjudged bad.

§ 48. In general.—The law of the forum governs in the limitation of actions. *Ames v. Le Rue*, 2 McL., 217; *Egberts v. Dibble*, 8 McL., 86; *McElmoyle v. Cohen*, 13 Pet., 312; *Jones v. Hays*, 4 McL., 521; *Randolph v. King*, 2 Bond, 104.

§ 49. It seems that where a contract is made in one state and sued on there, a decision in favor of the defendant upon the plea of the statute of limitations will operate as a bar to a subsequent suit in the same state, but will not extinguish the contract elsewhere. So held in an action of debt brought in Virginia on a promissory note made in Kentucky. By the law of Kentucky the note on which the action was brought was placed on the same footing as a sealed instrument, but in Virginia the common law rule prevailed, and the action on the note, considered as a simple contract, was barred; otherwise if a specialty. The case was decided on the question of the kind of contract, it being held to be a simple contract. *Bank of the United States v. Donnelly*,* 8 Pet., 361.

§ 50. It is a well settled rule of law in respect to statutes of limitation, that all suits must be brought within the period prescribed by the local laws of the country where the suit is brought; and this applies to contracts made beyond its political jurisdiction, as well as to those made within it. *Burns v. Crane*,* 1 Utah T'y, 179.

§ 51. The form of action, the course of judicial proceedings, and the time when the action must be commenced, are governed by the *lex fori*; the nature, validity and construction of contracts are governed by the *lex loci*; the statute of limitations appertains only to the remedy and is a part of the *lex fori*. So held in an action on a promissory note having an attesting witness, brought in New York, to which the defendant pleaded the state statute of limitations, and the plaintiff replied that by the law of Massachusetts, the residence of defendant, such a note was excepted from the operation of the statute. *Nicolls v. Rodgers*,* 2 Paine, 437.

§ 52. A plea of the statute of limitations is a plea to the remedy; it is a mere municipal regulation formed upon local policy; and a foreign statute cannot be pleaded in our courts. *Brown v. Bicknell*,* 1 Burn. (Wis.), 65.

§ 53. The statute of limitations of the state where the bankrupt resides, and not of the state where the creditor resides, must determine whether the debt is barred, and for that reason not provable against the bankrupt's estate. *In re Harden*,* 1 N. B. R., 97.

§ 54. It is not the statute of limitations of the state where the creditor resides, nor of the state where the contract was entered into, that determines whether a debt due from a bankrupt is barred, but the statute of the state where the bankrupt resides, and where the bankruptcy proceedings are had. *In re Kingsley*, 7 Am. L. Reg. (N. S.), 423; 1 Low., 216; 1 N. B. R., 329.

§ 55. In the year 1818, a daughter twenty-three years old conveyed all her remainder in the real estate which had belonged to her mother, to her father, for a nominal consideration. She married two years afterwards, and died in 1818. No complaint of the transaction was made

in the life-time of the daughter, nor during the life-time of the father, who died in 1831. The court inclined to the opinion that the lapse of time, and the death of the parties to the deed, were sufficient to warrant a court of equity in refusing to set aside the deed on the ground of undue influence. *Jenkins v. Pye*, 12 Pet., 241.

3. *Pleading and Proof.*

SUMMARY — *The plea need not refer to the statute, § 56.*

§ 56. Where the statute bars in twenty years, a plea of forty years' adverse possession is good. The plea of limitations need not refer in terms to the statute. So held in an action to recover certain real property situated in New York, in which the defendants pleaded in bar that they had been in the actual adverse possession of the premises for forty years next before the filing of the bill. *Harpending v. Dutch Church*, §§ 57-64.

[NOTES.—See §§ 65-115.]

HARPENDING v. THE DUTCH CHURCH.

(16 Peters, 456-494. 1842.)

APPEAL from U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The respondents rested their defense below on a plea in bar that they had been in actual adverse possession of the premises, in regard to which they are asked to account and make discovery, for forty years next before filing of the bill. The plea was sustained, and from which decree there was an appeal prosecuted to this court by the complainants. 1. They insist the plea is bad in form; and 2. Insufficient in substance:

§ 57. *Where the statute bars in twenty years, a plea of forty years' adverse possession is good.*

The first objection to the form of the plea is that it does not rely on twenty years' adverse possession, but on forty years; twenty years being the time of holding adversely to constitute a bar by the statute of New York. In this respect there is no technical rule observed by the courts of chancery. If the complainant by his bill, or the respondent by his plea, sets forth the facts from which it appears that the complainant by the statutes of the state has no standing in court, and for the sake of repose and the common good of society is not permitted to sue his adversary, it is the rule of the court not to proceed further, and dismiss the bill. Had the complainants set out the fact of forty years' adverse possession, then a demurrer interposing the bar would have been the proper defense, countervailing circumstances aside. Such was the course taken in *Humbert v. Trinity Church*, 24 Wend., 587, and which was in accordance with the established practice of courts of chancery.

§ 58. *The plea of limitations need not in terms refer to the statute.*

2. It is insisted that the act of limitations is not relied on by express reference to the statute of New York. We think it was unnecessary to rely in terms on the statute. It was more convenient not to do so. The bill seeks discoveries, the right to have which twenty years' adverse possession could only bar. It also seeks an account of the proceeds of sales of parts of the estate, and an account of the rents and profits of other parts, assuming the respondents to be trustees for the complainants. To this aspect of the bill six years forms the bar to a decree.

§ 59. — *the court will take judicial notice of the statute of limitations when the facts are set forth.*

The court is judicially bound to take notice of the statutes, when the facts

are stated and relied on as a bar to further proceedings, if they are found sufficient. So the chancellor of New York held in *Bogardus v. Trinity Church*, 4 Paige, 197, and we think correctly.

3. In regard to the substance of the plea, it is insisted for respondents, 1. That the answer does not cover and support the plea by the denial of facts alleged by the bill which, if true, obviate the bar. That, taking the facts alleged as established by admission, then the respondents were express trustees for the complainants, held possession for them, and are compellable to account regardless of the lapse of time.

§ 60. — *if the facts stated in the bill and not denied in the answer are sufficient to avoid the bar, the answer is insufficient.*

To test the sufficiency of the answer we must take every allegation of the bill as true which is not denied by the answer, and then inquire whether, those facts being admitted, the plea is sufficient to bar the claim to relief set up by the bill. 4 Paige, 197; Mitford, 300; *Plunket v. Penson*, 2 Atk., 51; 15 Ves., 377.

The complainants charge certain circumstances which, if true, preclude a bar, without admitting the existence of the bar; yet alleging facts which obviously stand in the way of relief unless the circumstances be true. They have the undoubted right to call on the defendants to furnish by their answer the evidence that they did hold the church estate as express trustees, and under and for the respondents. These facts would invalidate the plea if admitted, and the defendants must answer to all the matters which are specially alleged as evidence of these facts. Nor would the denial in the plea serve the purposes of the complainants, for, on setting it down for argument, its truth must be admitted. Story's Eq. Pleadings, 515, §§ 672, 673; Beames' Pleas in Equity, 33, 34.

Have the respondents furnished the evidence claimed from them, or have they repelled the circumstances by a sufficient denial of their existence? If unanswered the circumstances must be taken as true for the purposes of resisting the plea, as already stated, to the extent that they stand unanswered. The bill alleges that John Haberdinck, in 1696, jointly with four others, was seized in fee-simple of a tract of land called the Shoemaker's field, lying on the north-east side of Maiden Lane in the city of New York. In 1696 the parties divided the premises in part into lots; and the other tenants in common conveyed to John Haberdinck in severalty his one-fifth part of the lands divided, which are severally described by lots. That, previous to 1723, Haberdinck died, leaving no children. John Haberdinck, Jr., was the lawful heir of John, Sr.; and the complainants are descendants and heirs of John the younger. That no sale or devise of the premises has ever been made by any of the ancestors of complainants through whom they claim; and that they are entitled and seized as heirs at law and by right of succession. That the Reformed Dutch Church of the city of New York, by its ministers, etc., had had possession of the premises held in severalty by John Haberdinck, and claimed to have taken possession under some will or devise of John Haberdinck, whereby the premises were devised to them.

The first circumstance stated in evidence of the bar is that John Haberdinck in his life-time had let the premises, or some part thereof, to lease for ninety-nine years, and that the lease expired in 1819. When the bill was filed does not appear by the record. We take it, within less than twenty years after 1819. To whom the term of ninety-nine years had been granted, the

bill does not in this part of it allege. The defendants deny all knowledge of the existence of any such lease, except for three lots to William Huddleston, dated in 1723, for the term of seventy years, from the 1st of May of that year; and this lease is not thought to be genuine. This answer we deem sufficient.

It is next alleged that the ministers, etc., of the church are a religious corporation, duly incorporated and located in the city of New York; and as such obtained by purchase from some of the tenants in common with John Haberdinck the elder, or from some one claiming under them, parts of the Shoemaker's field not partitioned in 1723. This allegation needed no answer in support of the plea. One tenant in common may well hold adversely to, and bar his co-tenant. The complainants also allege they applied to the corporation for an inspection of title deeds; an account of sales; of rents and profits; for possession of the lands, and a partition of the undivided part; which had been refused.

If barred of the right to the land, so were the complainants of the relief sought by their request to the corporation. Nor has the contrary been assumed. As to title deeds, none but the lease for ninety-nine years could have aided the complainants; and the distinct answer that none such existed covers this allegation. As a supervening circumstance, complainants allege that respondents in 1822 acknowledged they entered and held under the will of Haberdinck the elder, by an account and inventory of their property rendered to the chancellor of New York pursuant to a statute of that state.

The will is then set out, dated 1722, by which the property was devised to the ministers, elders, etc., of the church, and their successors forever, with its probate; and devises therein, to the religious corporation, are alleged to be illegal and void; that no title was taken under the will; and that the possession was held in subordination to the right and title of the heirs at law. It is reiterated that the corporation entered as assignees under leases for long terms of years, made by John Haberdinck in his life-time, and which have lately expired; or, under some other title derived from John Haberdinck, and subordinate to the title of the heirs at law, but particularly under a demise by Haberdinck to the ministers, deacons, etc., or to some other person which was assessed to them, and which expired between the years 1810 and 1822. And under some title, subordinate to that of the heirs at law, the respondents have ever claimed, held and enjoyed the premises. That so late as the year 1810 they admitted, by an inventory returned to the chancellor, that they held under a demise to the corporation by John Haberdinck. The charter granted by the king in 1696 is substantially set forth, and it is averred the annual profits of the premises devised exceed £200, or \$500, the extent to which the church was permitted by law to receive profits; that from 1780 to 1800, the yearly value of the premises was \$10,000; from 1800 to 1820, \$20,000; and from that time to the date of the filing of the bill, of the yearly value of \$30,000.

That to keep down rents, long leases have been given at low rates; and then the leases have been sold out, and other lands purchased with the proceeds of the sales, and other investments made. That a religious corporation, which is by law incapable of receiving or taking lands by devise, cannot hold adverse possession of such lands upon which they have entered and always claimed under such devise. This being the case of the respondents, the complainants were entitled, as heirs at law, to rents and profits and the proceeds of sales; at least after deducting therefrom a support for the ministers of said church,

which the income greatly exceeded, and to which extent and no other, by the terms of the will, could the revenues and income of the devised premises be applied. And a discovery and account is asked of the surplus, if no more.

As to parts of the premises the defendants disclaim title; and as to other parts, they plead they had sold and conveyed in fee-simple more than forty years before the filing of the bill; and the alienated lands had ever since been held and enjoyed under the conveyances adversely to the claim of the complainants.

To such parts of the foregoing allegations as charge in any form a holding in subordination to the title of complainants as tenants in common, or by demises or otherwise, the respondents answer in various forms that they claim to hold for themselves in severalty and in fee-simple, and in hostility to the claim set up in the bill, for forty years next before it was filed; that they never acknowledged any title in the complainants, and that the expression in the return to the chancellor, that they held by demise under John Haberdinck, was a clerical error.

Respondents neither admit nor deny that they held under the will of John Haberdinck; or that they have received revenues and profits, as charged. These facts are treated as immaterial. Not being answered as repelling circumstances, they must be considered as true.

The plea avers that for forty years previous to the time of filing the bill, that is, from 1799, and up to the date of the plea, the defendants had been by themselves and their tenants in the sole and exclusive possession of all and singular the lands in the bill mentioned (except those disclaimed), during all of which time, all and singular the said lands have been improved by buildings, and inclosed with substantial inclosures, and actually occupied by themselves and their tenants, claiming and enjoining the same as being seized thereof in their *demesne* as of fee in severalty, and in their own sole and exclusive right, and as the exclusive and sole owners thereof, and to their own sole and exclusive use, and not otherwise; and that respondents have, in like manner, been in the receipt of the rents and profits.

As to that part of the premises alleged to have been sold, respondents plead that more than forty years before the filing of the bill, thus being in possession in their own right and severalty, and claiming the right to sell and convey in fee-simple absolute, did grant and convey the same in fee-simple absolute, for a valuable consideration to them paid, and which the corporation applied to its own use, claiming the right to do so without any accountability to any person whatever; and the said premises have ever since been held, occupied and enjoyed under said conveyances, adversely to the claim of the complainants in their bill set forth.

Stripped of the circumstances met by the answer, and the case presented to us for decision is simple. The complainants claim under Haberdinck the elder, as heirs at law. The respondents entered under the will of Haberdinck, and have for more than a century claimed under it. The complainants allege the will is void; the respondents disregard the allegation as immaterial, and raise no question on its validity. They rely on forty years' adverse possession, claiming to hold for themselves in fee-simple and in severalty. To cover the possession, no paper title is invoked; substantial inclosures and actual occupancy for forty years are relied on in substitution of a valid paper title. The plea having been set down for argument, the facts it assumes must be taken as true; and we are called on to pronounce the law on the facts.

§ 61. *The plea of limitation is a sufficient answer to a bill asking account of rents, profits, proceeds of sales, and production of title papers.*

The defense set up is independent of the complainants' case, and purely legal in its character, in so far as the bar is sought to protect the possession of the lands, supposing this to be the relief prayed. This is not the case, however; the bill seeks, 1. An account of the rents and profits. 2. An account of the proceeds of such parts of the lands as the corporation has sold. 3. The production of the title papers and rent rolls appertaining to the estate. 4. A discovery of the amount of the proceeds by rents and sales through a series of years; treating respondents as trustees for the complainants.

As these are incidents to the title, if it is confirmed in fee-simple to the respondents by force of the statute of limitations of the state of New York, and the complainants are barred of their recovery at law of the estate, the incidents of rents, proceeds of sales, and discovery of title papers follow the title, aside from the shorter bar of six years in regard to the money demands. At the end of twenty years from 1799, when the adverse possession commenced, if the statute of limitations applied to the case made by the plea, the defendants had a title as undoubted as if they had produced a deed in fee-simple from the true owner of that date; and all inquiry into their title or its incidents was as effectually cut off.

Complainants contend that in 1722 a devise to a corporation for the purpose of maintaining religion was void, where the income from the property bequeathed exceeded £200, being contrary to the statute of wills of Henry VIII.; therefore, the will of John Haberdinck was inoperative, and the premises descended to the heir at law. Nor could the corporation take by deed more than by will. Having no capacity to take by will or deed, and the operation of the act of limitations being a confirmation of a supposed paper title from some one of the whole premises, the corporation, in like manner, wanted capacity to take by force of the act of limitations; which would be in equal violation of the statute of Henry VIII. On this assumption the bill is obviously founded; and it is, in fact, the only question in the cause.

Respondents insist, on the other hand: 1. That the devise was to a charity, and therefore not embraced by the statute of Henry VIII. 2. That bodies corporate are excluded from the statute of Henry VIII., by the statutes of the state of New York. 3. That there is no allegation in the bill that the income of the devised premises was worth more than £200 in 1722, when the will took effect; and if the will was valid then, it continued to be valid afterwards, according to 2 Inst., 722. 4. That we are bound to presume, after the lapse of more than a century, the existence of a colonial statute authorizing the bequest; and which has been destroyed by time and the accidents of the revolution in the government.

§ 62. *The decisions of state courts on their acts of limitations bind the federal courts.*

These considerations are mere incidents in the controversy as it is presented to us; none of them seem to have been conclusively settled by the decisions of the state courts of New York, and therefore we express no opinion upon them. It may be true that in 1722 the corporation of the Protestant Dutch Church could not take, and yet in 1799 it was enabled by the statutes of New York to take and hold the premises. If so, time could confirm the title because of the newly created capacity. Be this as it may, we are bound to conform to the decisions of the state courts of New York in the construction of

their acts of limitation. Such is the settled doctrine of this court. *Green v. Neal*, 6 Pet., 291 (§§ 142-44, *infra*).

§ 63. *In New York religious corporations can defend and take title by force of the statute of limitations.*

The chancellor of New York held, in *Bogardus v. Trinity Church*, 4 Paige, 178, that the corporation could make defense, and that it did take title by force of the act of limitations. The court of errors held the same in *Humbert v. Trinity Church*, 24 Wend., 587. As no distinction is made by the state courts of New York between a religious corporation and an individual in regard to capacity to hold by force of the statute, none can be taken by this court.

§ 64. *The statute of limitations protects a naked possession to the extent of the substantial and actual inclosures.*

It is only left, then, to consider whether a naked possession is protected by the statute to the extent of the substantial and actual inclosures, for all the time necessary to form the bar. The statute of New York is in substance the same as that of the 21 Jac. I.; that such a possession as is set forth by the plea is protected by the statute has been the settled doctrine of the courts of that state for more than thirty years, if it ever was doubted. We need only refer to *Jackson v. Shoemaker*, 2 Johns., 234; *Jackson v. Wheat*, 18 Johns., 44; *Jackson v. Woodruff*, 1 Cowen, 285; and *Jackson v. Oltz*, 8 Wend., 440.

These cases were at law, and the statute is equally binding on the courts of chancery, where the complainants seek to have an account of rents and profits accruing out of a legal estate. This is also settled by the state courts of New York; in 4 Paige, 179, by the chancellor; and in 24 Wend., 587, above cited, by the court of errors. We therefore concur with the circuit court that the first part of the plea must be sustained for so much as it covers.

The second part of the plea, averring that all the parts of the lands sold had been conveyed, and the moneys received by the corporation more than forty years before the plea was filed, we deem a conclusive bar. The bill seeks the money, and six years barred relief; this being a concurrent remedy with an action at law.

For all the lots disclaimed by the answer and plea, the bill was properly dismissed; there was no probable cause for retaining it to obtain an account from the respondents; obviously no claim exists that can be made available for complainants in regard to this portion of the property. *Mitford's Pleadings*, 319. We order the decree below to be affirmed.

§ 65. *In general.*—Where the statute of limitations is not set up by plea or answer the court cannot take it into consideration. *Sullivan v. Railroad Co.*, 4 Otto, 806.

§ 66. Unless the statute of limitations be pleaded, the party in whose favor it has run will be deemed to have waived the benefit thereof. *Brown v. Jones*, 2 Gall., 477.

§ 67. The statute of limitations must be pleaded or it is not available as a defense. *Field v. Columbet*, 4 Saw., 523.

§ 68. Plea of the statute of limitations must be certain and specific. *Lyon v. Bertram*, 20 How., 149.

§ 69. Under the California statutes of limitations the plaintiff in ejectment having once established his legal title is presumed to have been in actual possession of the premises within five years next preceding the beginning of his suit, unless adverse possession is affirmatively proved by the defendant. *Dexter v. Hall*, 15 Wall., 26.

§ 70. An adverse possession cannot be presumed against a deed. If it exists it must be shown by the party who impeaches the deed and endeavors to avoid it. *Barr v. Galloway*, 1 McL., 476.

§ 71. Length of time cannot be presumed; the party relying upon it as a bar must prove it. *Hurst v. McNeil*, 1 Wash., 70.

§ 72. When the statute of limitations is set up by answer, if it is found to be a bar it excuses defendant from further answer. *Sampler v. The Bank*, 1 Woods, 526.

§ 73. Where there are two counts in a declaration, a plea of the statute of limitations need not be supported as to both; it may be supported as to both or either. *Chew v. Baker*, 4 Cr. C. C., 694.

§ 74. That a demand is stale, or barred by the statute, must be pleaded. *The Steamboat Swallow, Olc.*, 334.

§ 75. The statute of limitations in California. In what respects it differs from those of other states and of England. If not raised by demurrer the statute must be pleaded. *Norton v. Meader*, 4 Saw., 603.

§ 76. In an action against the indorser of a promissory note, payable sixty days after date, the plea should be *actio non accrevit* instead of *non assumpsit infra tres annos*. *The Bank v. Ott*, 2 Cr. C. C., 575; *The Bank v. Eliason*, 2 Cr. C. C., 667.

§ 77. The possession of a purchaser from a defendant in ejectment *pendente lite* will not justify the plea of the statute of limitations. *Walder v. Bodley*, 9 How., 34.

§ 78. It seems that a disability created by the statute of limitations must be averred and proved. *Scott v. Evans*, * 1 McL., 486.

§ 79. Evidence to prove adverse possession is admissible although the statute of limitations is not pleaded. *Hogan v. Kurtz*, 4 Otto, 773 (§§ 619-22).

§ 80. The act of Virginia of December 13, 1792, limiting the time of issuing writs of *scire facias* in certain cases, is an act of limitations and must be pleaded. *Offut v. Henderson*, 2 Cr. C. C., 553.

§ 81. Where a case is submitted without argument, the record showing that the claim accrued more than six years before the filing of the petition, and nothing appears in the record sufficient to take the case out of the statute of limitations, the petition will be dismissed. *Campbell v. United States*, * 13 Ct. Cl., 108.

§ 82. The plea of *non assumpsit infra tres annos* is not a good plea upon a promissory note payable thirty days after date. *Ferris v. Williams*, 1 Cr. C. C., 475.

§ 83. Time to plead.—The statute of limitations must be pleaded strictly within the rule day, unless the court, for good cause shown, shall permit it to be pleaded afterwards. Ignorance of the practice of the court may be an excuse for an attorney recently admitted to the bar, which, with other circumstances, may be good cause for admitting the statute to be pleaded after the rule day. *Union Bank v. Eliason*, 2 Cr. C. C., 629.

§ 84. Where an administrator is defendant, the court sitting in Alexandria will permit him to plead the statute of limitations at the trial term, to which plea the plaintiff cannot make more than one replication. *Offut v. Hall*, 2 Cr. C. C., 363.

§ 85. If the defendant instruct his attorney to plead the statute of limitations, and he pleads it after the rule day, the court will refuse to order the plea to be stricken out, if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be filed strictly within the rule day. *Wetzell v. Bussard*, 2 Cr. C. C., 252.

§ 86. If the statute of limitations be pleaded after the plea day, without leave of the court, the plea will, on motion, be ordered to be stricken out. *Scott v. Lewis*, 2 Cr. C. C., 203.

§ 87. The statute of limitations may be pleaded on the first day of the term next after office judgment. *Mechanics' Bank of Alexandria v. Lynn*, 2 Cr. C. C., 246.

§ 88. The defendant has the right to plead the statute of limitations at the first term after office judgment, it being an issuable plea. *Morgan v. Evans*, 2 Cr. C. C., 70.

§ 89. In Alexandria, D. C., the statute of limitations may be pleaded upon setting aside the office judgment at the first term. *Gregg v. Boutz*, 2 Cr. C. C., 115.

§ 90. The court will permit the plea of limitations to be filed after the rule day, upon an affidavit showing it to be a fair defense under the circumstances of the case. *Beatty v. Van Ness*, 2 Cr. C. C., 67.

§ 91. The court will not permit the plea of the statute of limitations to be filed after the rule day, unless it be shown by affidavit to be necessary for the justice of the case. *Thompson v. Afflick*, 2 Cr. C. C., 46.

§ 92. After interlocutory decree and an issue ordered, the court will not permit the defendant to plead the statute of limitations and to file an answer. *Wilson v. Turberville*, 2 Cr. C. C., 27.

§ 93. In actions against executors and administrators the statute of limitations may be pleaded after office judgment. *Wilson v. Turberville*, 1 Cr. C. C., 492.

§ 94. The court will not permit the statute of limitations to be pleaded to an action of trespass for mesne profits after the rule day, except upon payment of all antecedent costs and a continuance or postponement at the option of the plaintiff. *Marsteller v. McClean*, 1 Cr. C. C., 550.

§ 95. General issue.— Upon information filed to enforce a forfeiture for a violation of the internal revenue laws, the defendant need not plead the statute of limitation, but may take advantage of the same under the general issue. *United States v. Six Fermenting Tubs*, 1 Abb., 269.

§ 96. In *assumpsit* for goods sold and delivered, *held*, that the defendant could not avail himself of the statute of limitations upon the general issue; that the time was not put in issue by the plea of *non assumpsit*. *Neale v. Walker*, 1 Cr. C. C., 57.

§ 97. Plea not favored.— The plea of the statute of limitations is not favored in law, and the filing of such a plea out of time will not be permitted when there has been negligence and there is no pretense of merits. In an action brought on a judgment rendered in 1830, the defendant, after filing several pleas, asked leave to plead the statute of limitations, alleging as an excuse for not filing it before that he was misled by mistakes in the printed copy of the law. The leave was refused. *Reed v. Clark*,* 3 McL., 480.

§ 98. Nil debet.— The statute of limitations cannot be given in evidence upon the plea of *nil debet*. *Gardner's Administrator v. Lindo*, 1 Cr. C. C., 78; *McIver v. Moore*,* 1 Cr. C. C., 90.

§ 99. New plaintiff.— Pleadings cannot be so amended as to bring into the suit a new plaintiff, who would otherwise be barred by the statute. An act of congress, passed in 1860, provided for the adjustment of land claims in Louisiana, emanating from foreign governments prior to the cession to the United States; this act being temporary was renewed in 1867; under the act of 1867, Eloise Innerarity and others, claiming to be heirs of James Innerarity, deceased, in 1870 filed a bill averring that they as such heirs were entitled to a judicial recognition of a Spanish patent of certain lands made to one Ramos and subsequently becoming the property of their ancestor; subsequently, in 1871, a supplemental petition was filed, averring a mistake and that the lands rightfully belonged to the heirs of John Watkins; the act of 1867 had then expired. The amended petition was not allowed. *United States v. Innerarity*,* 19 Wall., 595.

§ 100. Pleading by plaintiff.— It seems that where the statute of limitations is pleaded, at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him in his replication or by amendment of his bill to set forth the facts specially. An action was brought in equity to obtain possession of land; the plaintiffs held the legal title, but defendant had acquired title by adverse possession; at the time the cause of action vested in plaintiffs, they were minors and continued such for at least eight years: the plaintiffs did not set forth this fact in their bill or in a replication. *Miller v. McIntyre*, 6 Pet., 61.

§ 101. When defendant pleads limitation, the plaintiff must plead the fact that takes it out, or the plea stands admitted. *United States v. Buford*, 3 Pet., 30.

§ 102. Amendment for the purpose of settling up the statute of limitations.— Owing to carelessness or inattention on the part of his attorneys, J. filed his claims so late that the statute of limitations would have been a bar, and defendant desired to amend so as to set it up. J. was a non-resident creditor, who had a legal lien on the assets, and had prepared and forwarded his proofs soon enough. The attorneys were deterred from proceeding on account of another case of similar character pending, and by the request of the assignee's attorneys, on the ground that an appeal was to be taken. It was held that it would be inequitable to allow an amendment so as to defeat a claim otherwise equitable and just. *In re Bear*,* 8 Fed. R., 428.

§ 103. If an exception to the statute of limitations is not pleaded, evidence of it is not admissible. Thus where the plaintiff asked leave to amend in an action founded on mutual accounts, and, the statute having been pleaded by defendant, he replied that the cause of action accrued within three years, it was held he could not show, under that plea, the exception in favor of mutual accounts, and the leave was refused. *Clarke v. Mayfield*,* 3 Cr. C. C., 853.

§ 104. In June, 1827, the plaintiff in error filed his bill against Vattier and the Bank of the United States, seeking to obtain possession of certain lands. The bill set forth that Bartle, the legal owner of the premises, mortgaged the same to Barr, a citizen of Kentucky; that Charles Vattier fraudulently purchased the mortgage and obtained possession under it from the tenants and acquired the legal title from J. C. Symmes, in whom it was vested; that the Bank of the United States had obtained possession and a legal title under a mortgage from Vattier's grantee; that plaintiff had purchased Bartle's rights. The defendants had been in possession adverse to Bartle since 1797. The plaintiff relied, in the argument, on Bartle's non-residence as an exception to the running of the statute. It was held that the exception of non-residence was not in issue and the court could not take notice of it. *Piatt v. Vattier*, 9 Pet., 405 (§§ 735-36).

§ 105. To avoid a statute of limitations a party must show himself to be within its exceptions. *Ross v. Duval*, 13 Pet., 45.

§ 106. An exception to the statute of limitations need not be pleaded specially, but may be given in evidence on the trial, when the plaintiff claims by adverse possession and does not

set out his title. In an action brought to recover certain property in California, the plaintiff claimed title by adverse possession and the defendant had the legal title and had obtained possession in an ejectment suit; the plaintiff insisted that the defendant was barred by the general statute of limitations and relied on an exception in favor of Spanish grants. In his own pleading he simply alleged his seizin in the ordinary way before and at the date of the ouster, without setting out his title. *Palmer v. Low*,* 2 Saw., 248.

§ 107. Criminal actions.—The statute of limitations need not be pleaded in criminal cases; the plea of “not guilty” puts in issue the whole case—including the statute of limitations—on both sides. *United States v. Brown*,* 2 Low., 267; *United States v. White*,* 5 Cr. C. C., 116.

§ 108. A bar created by the statute should be pleaded, as the court, on a collateral proceeding, cannot look behind the sentence, if the court had jurisdiction. So held where the defendant had been convicted of a crime and he then sued out a writ of *habeas corpus*, on the ground that the indictment was barred by the lapse of two years, under the statute of 1790. *Johnson v. United States*,* 8 McL., 89.

§ 109. Demurrer.—In Wisconsin, the statute of limitations, as construed by the state courts, may be set up by demurrer; this construction is binding on the United States courts. So held in an action on a judgment rendered more than ten years before the commencement of the action, to which the defendant demurred on the ground that it appeared on the face of the complaint that the claim was barred by the statute of limitations. *Chemung Canal Bank v. Lowery*, 3 Otto, 72 (§§ 5, 6).

§ 110. A defense grounded on the staleness of the claim and the laches of the claimant may be set up by demurrer. *Landsdale v. Smith*, 16 Otto, 391.

§ 111. If it appears on the face of the bill that the demand is barred by the statute of limitations, a demurrer is properly sustained. *National Bank v. Carpenter*, 11 Otto, 568; *Rhode Island v. Massachusetts*, 15 Pet., 233.

§ 112. The statute of limitations may be set up by demurrer. *Sheldon v. Keokuk Northern Line Packet Co.*, 8 Fed. R., 775; *United States v. Watkins*, 3 Cr. C. C., 441.

§ 113. The statute of limitations cannot be taken advantage of by demurrer to an indictment. *United States v. Cook*, 17 Wall., 178.

§ 114. Where a bill in equity states a case to which the act of limitations applies, without bringing it within some of the savings, the defendant may take advantage of the bar by demurrer. *Wisner v. Barnet*, 4 Wash., 631.

§ 115. The defense of the statute of limitations may be taken advantage of by demurrer, if the statute is distinctly stated in the demurrer. *Burns v. Crane*,* 1 Utah T'y, 179.

4. What Causes the Statute Affects.

SUMMARY — *Statutes prospective*, § 116. — *Repeal of exception*, § 117. — *Tax deed*, § 118.

§ 116. A statute of limitations is prospective in its operation and affects causes of action only from its passage. So held where a judgment was obtained in a state court of Ohio in 1854, by Sohn against Waterson, who soon after removed to Kansas. In 1859 the legislature of Kansas passed an act limiting actions on notes, judgments, etc., accrued out of the territory to two years after the causes of action had accrued. Sohn sued on the judgment in Kansas in 1870, and Waterson pleaded the statute. *Sohn v. Waterson*, §§ 119, 120.

§ 117. Where a saving clause in a statute of limitations is repealed, the statute begins to run—on a cause of action or against a person so excepted—from the time of the repeal. So held where an action of covenant was brought in Illinois, in 1843, upon a cause of action accrued before 1827. The plaintiff, at the time the cause of action accrued, was and continued to be beyond the limits of the state. The act of 1827 allowed actions in favor of non-residents to be commenced within sixteen years after they should come within the state. In 1837 this exception was repealed except as to persons under certain disabilities. *Lewis v. Lewis*, §§ 121, 122.

§ 118. The statute of limitations runs in favor of a tax deed valid on its face but irregularly issued. *Peck v. Comstock*, § 123.

[NOTES.—See §§ 124–139.]

SOHN v. WATERSON.

(17 Wallace, 596–600. 1873.)

ERROR to U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—A judgment was obtained in a state court of Ohio in 1854 by Sohn against Waterson, who soon after went to Kansas, and re-

mained there. In 1859 the legislature of Kansas passed an act limiting actions on notes, judgments, etc., accrued out of the territory, to two years after the cause of action had accrued. Sohn sued on the judgment, and Waterson pleaded this statute. There was a demurrer and judgment for the defendant.

Opinion by MR. JUSTICE BRADLEY.

The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.

§ 119. *Construction of statutes.*

A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction, and one which prevents the legislative intent from being frustrated. "Words in a statute," says Justice Paterson, "ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States v. Heth*, 3 Cranch, 413. And this rule is repeated by this court in *Harvey v. Tyler*, 2 Wall., 347 (Courts, §§ 468-74), where it is said: "It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

§ 120. *A statute of limitations is prospective in its operation and affects causes of action only from its passage.*

The plaintiff contends that the application of this rule to the statute in question would have the effect of restricting its application to actions accruing after the passage of the act. But this is not a necessary conclusion.

A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom. When a statute declares that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act without any limitation at all (which it is presumed could not have been intended), another rule adopted is to construe the statute as applying to such existing actions only

as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires — which reasonable time is to be estimated by the court — leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross v. Duval*, 13 Pet., 62, and *Lewis v. Lewis*, 7 How., 778 (§§ 121–22, *infra*). In those cases certain statutes of limitation — one in Virginia and the other in Illinois — had originally excepted from their operation non-residents of the state, but this exception had been afterwards repealed, and this court held that the non-resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. “The question is,” says C. J. Taney, speaking in the latter of the cases just cited, “from what time is this limitation to be calculated? Upon principle, it would seem to be clear that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.” It is true, that in the subsequent case of *Murray v. Gibson*, 15 How., 421, this court followed the decisions of the supreme court of Mississippi in its construction of a statute of that state, and held that it applied only to actions accruing after the statute was passed. But that decision was made in express deference to those of the state court, which were regarded as authoritative. In the present case we are not bound by any decisive construction of the state court on this point.

Judgment affirmed. (a)

LEWIS v. LEWIS.

(7 Howard, 776–784. 1848.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Illinois.

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—This case depends upon the construction and operation of the statutes of limitation of the state of Illinois, and comes before us upon a certificate of division between the judges of the circuit court.

It is an action of covenant, brought in 1843, upon causes of action which accrued before 1827. The defendant pleaded the statute of limitations; to which the plaintiff replied, that, at the time the causes of action accrued, he was in parts beyond the limits of the state, and has ever since remained, and yet is, beyond the limits of the state. The defendant demurred to this replication and the plaintiff joined in demurrer.

An act for the limitation of actions was passed on the 10th of February, 1827, by which it was, among other things, provided that every action for the performance of covenants should “be commenced within sixteen years after the cause of such action should have accrued, and not after.” But, by a proviso in the seventh section of the act, it is declared that every person who was or should be at the time of such cause of action beyond the limits of the state might institute his action within the time limited in the act, after coming within the state. Afterwards, by a law passed February 11, 1837, it was en-

(a) Affirming *Sohn v. Waterson*, * 1 Dill., 358.

acted that this proviso should not be held to extend to any non-resident, unless such non-resident was under the age of twenty-one years, insane or *feme covert*.

Upon the argument of the demurrer the following points arose, upon which the judges were opposed in opinion, and which have been certified to this court: "1. Whether the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, or from the time the debt became due. 2. Whether the statute began to run before administration was granted. 3. Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1827."

Previous to the act of 1827, there was no law of the state of Illinois which limited the time within which an action of covenant should be brought; and, consequently, there was no restriction as to the period within which a suit might be instituted upon the cause of action now in question. The same thing was the case after the passage of this act, as long as the plaintiff continued beyond the limits of the state. For, until he came into it, the proviso above mentioned excluded this cause of action from the operation of the statute. And as the plaintiff did not come into the state, there was no limitation running against it until the passage of the act of 1837. This act, by repealing the saving contained in the former law, brought the claim within its provisions, and subjected it to the limitations therein contained.

The question is, from what time is this limitation to be calculated? Upon principle, it would seem to be clear that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided. For it is at that time that the statute first acts upon it, and limits the period within which suit must be brought. Such is obviously the policy and intention of the Illinois statute of limitations. For if the plaintiff had come into the state the day before the act of 1837 was passed, and by that means subjected his cause of action to the provisions of the former law, the limitation would have commenced running on that day, and his action would not have been barred until the expiration of sixteen years afterwards. For the act of 1827 gave him sixteen years from the time he brought his cause of action within its operation.

He did not, however, come into the state; and his cause of action was brought within the limitation of that law, not by his own act, but by another law. Can there be any reason for a different run of limitation in the latter case from that which the law itself has provided in the former? The construction and object and policy of the act of 1827 must be the same in both instances; and the act 1837 makes no change in it in that respect. It merely subjects the cause of action to its limitations, and does precisely what the plaintiff himself would have done if he had come into the state; that is to say, it brought the plaintiff within the limitations of the former law, and subjected him to the restrictions therein contained.

The question, however, has been already decided in this court in the case of *Ross v. Duval*, 13 Pet., 62. In that case, a saving clause in a statute of limitation of Virginia, similar to the one contained in the Illinois law, had been repealed by a subsequent statute. And this court decided that, against the persons embraced in the saving clause of the original law, limitations would not begin to run until the time of the repeal; and that the party was entitled to the full period of limitation prescribed in the original act, commencing from the date of the repealing law.

A passage in the report of that case, in page 64, was cited in the argument, as maintaining a contrary doctrine. But it will be found to be entirely consistent with what the court had previously said. It relates to claims included in a statute of limitations, when, from the language of the law, it may be justly inferred that the legislature intended to embrace a period of time already past, during which the party had omitted to sue, yet still leaving him reasonable time to prosecute his claim. But the rule there stated can have no application to the case before us; for this claim was not embraced in, nor operated upon by, the statute of limitations of 1827. It was brought within it by the subsequent law. And that law makes no new limitations as to past or future time, and merely subjects the cause of action to the provisions of the original law. The passage above mentioned, therefore, cannot apply to it, and is not inconsistent with what had before been said in relation to the effect of a law repealing a saving in a former act of limitations.

§ 121. *When a saving clause in a statute of limitations is repealed the statute runs only from the time of the repeal.*

Under this view of the subject the court is of opinion, upon the first point in the certificate of division, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before; and will direct it to be so certified to the circuit court.

And as this decision disposes of the whole case presented by the demurrer, the other points do not arise; and it is unnecessary to examine them.

Dissenting opinion by MR. JUSTICE McLEAN.

I dissent from the opinion just pronounced. It overrules a solemn decision of this court in the case of *Ross v. Duval*, 13 Pet., 57. And as that opinion is relied on as sustaining the decision now given, I shall examine it.

The judgment of the court in that case was placed upon two grounds. First, that the action was barred under the statute of Virginia of 1792. That act provided that, where an execution had not issued on a judgment, it might be revived within ten years, or where an execution was issued, and there was no return, other executions might be issued within the ten years from the rendition of the judgment. There was a saving in the act in behalf of infants and persons beyond the commonwealth, "giving five years after the removal of the disability to proceed on the judgment."

By the act of 1826, the saving in the act of 1792 was repealed, but the time of the bar was to be computed, as specially provided, from the time of the repeal of the saving.

The court considered the act of 1792 as a limitation on the judgment, and, as more than ten years had elapsed, that all proceedings on the judgment were barred. There was nothing in the pleadings or evidence which showed that the plaintiff was within the saving of the statute.

And the court remark: "There is another view of this case, which, though not much considered in the argument, is deemed important by the court." "And this arises under the process act of 1828" (4 Stats. at Large, 178), etc. "If the act of 1792, or any part of it, is to be considered as a process act merely, and not an act of limitations, the act of 1828 makes it the law of congress for the state of Virginia, and gives immediate effect to it." "If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect as a rule of property, and is a rule of decision in the courts of the United States under the thirty-fourth section of the judiciary act." "In

either case, effect is given to the act of 1792, and it is decisive of the present controversy.”

“But if it be considered, as contended, an act of limitations adopted by the act of 1828, the court are to give a construction to the act of 1828. If this be clear in its provisions, we are bound to give effect to it, although it may, to some extent, vary the construction of the act of 1792. And this is no violation of the rule that this court will regard the settled construction of a state statute as a rule of decision. For in this case, the construction of the state law, in regard to the effect it shall have, is controlled by the paramount law of congress.”

“The judgment in the circuit court was entered in 1821, so that seven years of the ten years’ limitation of the act of 1792 had run when it was adopted by the act of 1828. Now the question is, shall no effect be given to this act of congress in Virginia before its passage, because of the construction by the Virginia courts of the act of 1792?”

“It must be recollected that this act of 1828 is a national law, and was intended to operate in the national courts in every state. As it regards some of the states, it may at first have operated less beneficially in them than in others; but its provisions took immediate effect in all the states.”

“It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases.”

“There may be some contradictory decisions on this point in some of the states, which have been influenced by local considerations, and the peculiar language or policy of certain acts of limitations. But the rule is believed to be founded on principle and authority.”

I have cited largely from the above decision to show that the point was distinctly considered and decided, as arising under the act of 1828, that effect may be given to a statute of limitations where a part of the time has run, but a reasonable part of the whole time has yet to run. And this is the principle which is repudiated in the case under consideration. I have a distinct recollection that the point was first suggested by the lamented Justice Story, and was discussed, and the principle was laid down with the entire concurrence of the court, so far as I know. There was no dissent expressed, either in consultation or on the bench.

It is true there was another ground on which the decision was rested; but it was also placed upon this ground, so that one ground as well as the other was ruled by the court. In the case of *Ross*, the court say: “The saving clause of the act of 1792, as to non-residents, is repealed, the only effect of which is to bring within the limitation of the statute of 1792 those who were within its saving clause, and against whom the statute had not begun to run. Against such persons the statute could not begin to operate until the repeal of the exception by the act of 1826.” And that remark is considered by the court, in the case before us, as having been made on general principles. Now, such was the express provision of the act of 1826, that it should take effect from its date, and the remark was made in reference to that provision.

§ 122. *Rule of construction of statutes of limitations.*

There is no rule better settled, in the construction of statutes of limitations, than that effect must be given to them according to their language. If they

make no exception in favor of infants, *femes covert*, or non-residents, the courts can make none. And when the exceptions of a statute of limitations are repealed, the act stands as though it had been originally passed without them. In *Jackson v. Lamphire*, 3 Pet., 280 (Constr., §§ 1845-48), the court say: "The time and manner of their operation [statutes of limitations], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature. Cases, however, may occur where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of the court. If the legislature of a state should pass an act by which a past right of action shall be barred, and without any allowance of time for the institution of a suit in future, it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." It must be admitted that the legislature could not bar a claim to which there was no bar; but no one can doubt that a statute may bar claims where the right of action existed, and a reasonable part of the whole time of the statute has to run. This is often done in some of the states. But while it is not doubted that the legislature may do this, it is objected that it cannot be done as a matter of construction.

This objection is more plausible than sound. The statute creates a bar, and the question arises on its construction, whether it is "so unreasonable as to amount to a denial of a right," in the language of this court in the case above cited. If the answer to this shall be in the affirmative, then, in the language above cited, "it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." But if the question can be answered in the negative, then a court is bound to give effect to the statute. And here is an answer, in the words of this court, to the principal ground taken in the case under consideration, and on which the decision is founded. If the court may determine whether a statute is so unreasonable as to cut off a private right, of necessity they may decide whether it is not so reasonable as to be enforced.

In the case before us, the Illinois act of 1827 limits the right of action to sixteen years, and the proviso gives the same time to sue to a non-resident after he shall come within the state. But this proviso was repealed by the act of 1837, which placed residents and non-residents, as to the time of bringing an action, on the same footing. The plaintiff's cause of action accrued under the act of 1827; in 1837, the saving being repealed, six years were left for the statute to run to bar the claim. Was this a reasonable time? The answer must be in the affirmative. Then the act is not unconstitutional. It deprives the party of no right. In the language of the court in the case of *Ross v. Duval*, 13 Pet., 64, "the time yet to run (when the proviso was repealed), being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." There can be no mistake as to the point decided by the court; and that point is directly opposed to the decision now made. In such cases it is always better to overrule a former opinion directly than to destroy its force by indirection. In their former opinion the court say: "The rule is believed to be founded on principle and authority."

In statutes of limitations it is usual to say they shall begin to run from the time the action shall hereafter accrue, and when a saving of such act is repealed, that it shall operate from the date of the repeal; and if these provis-

ions be not in the acts, they will, as a matter of course, take effect upon their passage. They must take effect from their passage, unless the language shows the time is to be computed from the date of the act. Without this provision the question would arise whether a reasonable part of the time allowed by the statute, from the time the action accrued, had yet to run, as before remarked.

In *Lockett v. Dunn & Bass*, 3 Litt., 218, the court say: "But the privilege previously allowed to persons who might be out of the country when their cause of action or right of entry accrued, to maintain their action within ten years after their return, was expressly repealed by the first section of the act of January, 1814, which, by a subsequent clause in the third section of the same act, was to take effect at the expiration of six months from its passage; and it was not until more than a year after the passage of that act that this suit was brought by Lockett in the circuit court. It is obvious, therefore, that the absence of Buckner Pitman cannot have prevented the time which has elapsed since the lot had been held adversely by the defendants, and those through whom they claim, from barring the plaintiff's action.

The rule of so construing a statute as not to give it a retrospective effect is admitted. And a legislature can never be presumed to intend to destroy a vested right. Indeed they have no power to pass such a law. But a law may be constitutional and yet have a retrospective effect. *Satterlee v. Matthewson*, 2 Pet., 380 (Const., §§ 1630-35). In the case under examination it is not proposed to give the statute a retrospective effect, or to affect, in any degree, vested rights by a construction of it. The only question is whether the six years that the statute had to run, on the repeal of the saving, is a reasonable part of the whole time required by the act to constitute a bar. The plaintiff, though not a resident of the state, might have sued so soon as the right of action accrued.

PECK v. COMSTOCK.

(Circuit Court for Wisconsin: 6 Federal Reporter, 22-26. 1881.)

Opinion by BUNN, J.

STATEMENT OF FACTS.—This action is brought by the complainant, who resides in Michigan, to set aside and cancel a tax deed upon certain land lying in the county of Burnett, in the state of Wisconsin, upon which the plaintiff holds a mortgage executed by one William S. Patrick. The mortgage has been foreclosed, and the time of redemption has expired, but no sale has been made. The land was sold for taxes in May, 1874, for the taxes of 1873, and certificates of sale duly issued, which were afterwards duly and regularly assigned to the defendant, who, on May 31, 1877, the time for redeeming the lands from sale having expired, took out a tax deed from the clerk of Barron county, in which the lands then lay, which deed was, however, irregular and void upon its face from being sealed with the clerk's private, instead of his official, seal, as the law requires. This irregular deed was acknowledged and recorded. On August 4, 1877, the defendant Comstock, ascertaining that his deed was irregular, applied to the clerk to have a new deed issued, without, however, complying with the statute, which requires notice of such application to be given by publication. The clerk thereupon issued a new deed, which as a first deed is strictly regular in form and sufficient in all respects to convey the title in the land to the defendant, all the previous tax proceedings being conceded and alleged in the complaint to be regular and valid; but as a second

deed it is irregular and void, because it does not recite, as the statute requires in such cases, the issuing of the previous irregular deed: The bill is quite specific in its allegations of the regularity of the tax proceedings up to the issuing of the deeds, perhaps for the purpose of showing that the deed sought to be set aside constitutes a cloud upon the plaintiff's title. It appears upon the face of the complaint that the time within which actions are allowed to be brought under section 1210, Revised Statutes, to set aside or cancel a tax deed had expired when this action was brought; and the defendant demurs to the complaint on this ground as well as that the facts set forth are insufficient to entitle the plaintiff to relief in equity.

§ 123. *The statute bars an action to set aside a void tax deed.*

The question for determination is whether or not the statute of limitations runs upon the deed. I think it does and that the demurrer must be sustained. Within the decisions of the supreme court of the state of Wisconsin, which I feel bound to follow on this question, I think there can be little room for doubt. It is claimed by complainant that the tax deed is void, and therefore the statute does not run upon it. But within the cases of *Marsh v. The Supervisors*, 42 Wis., 502; *Philleo v. Hiles*, 42 Wis., 527; and *The Oconto Co. v. Jerard*, 46 Wis., 324, the deed being void does not prevent the application of the statute. And such I understand to be the uniform holding of that court and the settled construction placed upon the statute. *Edgerton v. Bird*, 6 Wis., 527; *Lawrence v. Kinney*, 32 Wis., 281; *Wood v. Meyer*, 36 Wis., 308; *Hill v. Kricke*, 11 Wis., 442; *Knox v. Cleveland*, 13 Wis., 245; *Milledge v. Coleman*, 47 Wis., 184.

The deed in this case sought to be set aside is conceded to be perfectly regular on its face as a first deed. It is in fact just such a deed as the defendant was entitled to receive when he took out the irregular deed on the 31st of May. It is sufficient on its face, and does *prima facie* convey a complete title in fee to the land. It is only by going outside and beyond the deed itself and the record thereof that the irregularity can be shown which would avail to avoid the deed, if the inquiry had been instituted within the time when such inquiry would have been proper. See *Guest v. City of Brooklyn*, 69 N. Y., 573; *Marsh v. City of Brooklyn*, 59 N. Y., 283.

If Comstock had brought an action of ejectment to recover the lands, then it is clear that the introduction of this deed in evidence would have supported his claim of title, and that it would devolve upon the former owner to show affirmatively the irregularities which would go to render the deed void in fact. This is one of the very inquiries intended by the statute to close. The statute of limitations is one of repose, and it would answer but a poor purpose if it had no effect to cut off inquiries, the result of which would be to show that the deed was not merely voidable, but void in fact. Here the officer had full power and jurisdiction to issue a tax deed, and the defendant was entitled to one conveying full title to the land. Under the decisions of the supreme court before the statute was passed requiring notice to be given on application for a second deed, the defendant would have been entitled to just such a deed as this, and it would have conveyed a title in fee to the land. The statute was passed requiring notice of the application to be given, and certain other formalities to be observed which were not observed in this case, and the non-observance of which it is conceded rendered the deed void in fact. But it cannot be likened to a case where there is a total want of power to issue a deed. If it were possible to conceive different degrees of void-

ness, it seems clear that the deed is no more void in this case than one where there has been no assessment, as in *Marsh v. The Supervisors*, or where there has been no notice of sale of the land, or where the land has been sold to raise moneys in part that constituted no portion of the tax levied, as in *Milledge v. Coleman*, 47 Wis., 184, where it was held that the statute run upon the tax deed. In all those cases it was not possible that there could be any valid tax deed on the sale, while here there could have been, as the proceedings up to and including the sale were all regular; and if the statute runs in those cases it is evident that it does in this.

In that case, which is the last expression of the supreme court on the question, the court say: "In the very recent case of *Oconto Company v. Jerrard*, 46 Wis., 317, the effect of the tax deed where the statute had run was very fully considered. In that case there was no pretense that the tax for which the deed was issued proceeded upon a regular, fair and equal assessment of the property to be taxed. A more fundamental and fatal defect in the tax proceedings than this could not well exist, since a valid assessment is the foundation of the tax. In answer to the argument that the statute was not intended to apply to such a case, and that the deed could be impeached for a radical defect, the chief justice uses this language: 'The respondents had their day to impeach the tax proceedings and avoid the tax deed; then they might have said that the groundwork was so defective that there was no tax. This they did not then do, and they are now too late to do it. They suffered the statute to purge the tax proceedings of all defects, to raise the tax deed above impeachment. Their objections may be all well founded, but they came out of time. What the respondents might have said they cannot now say. The statute has left them like one estopped to speak the truth, because they did not speak it when they might.' That has been the construction uniformly given by this court to the statute of limitations in relation to tax deeds. It has been uniformly held in a multitude of cases, that, as against the grantee of a tax deed, the statute puts at rest all objections against the validity of a tax proceedings, whether resting on mere irregularity or going to the groundwork of the tax. The statute makes a deed valid on its face *prima facie* evidence, as soon as executed, of the regularity of all proceedings from the assessment of the land inclusive to the execution of the deed, and the effect of all the decisions is that, when the statute has run in favor of the grantee, the debt becomes conclusive to the same extent. The terms of the statute bar any action to recover possession of land sold and conveyed by deed for non-payment of taxes, and the learned counsel for the respondent contends that to bring a tax deed within the statute the validity of the tax and of the sale must be established. Such a construction would go far to make the statute a dead letter. The statute was designed to protect things *de facto*, not things *de jure*. When there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power, the statute applies; and the trouble with the argument is that in such a case, saving the instances excepted by the statute itself after the statute has run, the tax deed itself conclusively establishes the validity of the tax and of the sale."

Demurrer is sustained and judgment for the defendant.

§ 124. Limitation must be reasonable.—The limitations for the commencement of actions prescribed by the legislature, in so far as they affect existing contracts, are not conclusive on the courts; the limitation so fixed must be reasonable, and the courts have the right to determine whether the time so limited is reasonable. *Pereles v. City of Watertown*,* 6 Biss., 79.

GENERAL PRINCIPLES.—WHAT CAUSES THE STATUTE AFFECTS. §§ 125-139.

§ 125. Action brought upon city bonds dated August 1, 1853, payable within ten years thereafter; the limitation for actions on such contracts at that time was twenty years; the legislature of the state (Wisconsin) passed, April 8, 1872, an act requiring actions of the nature, if already accrued, to be commenced within one year after its passage; the action was commenced in April, 1874; the act was held unconstitutional. *Ibid.*

§ 126. Judgments of other states.—The statute of Mississippi of 1846, limiting suits on judgments recovered out of the state, does not affect judgments recovered before its passage. It refers to the time of the commencement of the action and not to the time of trial. An action of debt was brought in Mississippi in 1850, on a judgment recovered in 1844 in Louisiana. The defendant pleaded that at the time of the rendition of the judgment and down to the time of pleading, he was a resident of Mississippi, and also the statute of 1846, which barred actions on judgments recovered out of the state against residents, after three years. The plaintiff had judgment. *Murray v. Gibson*, * 15 How., 421.

§ 127. Applies to subsequent statutes.—The act of 1790, limiting the time in which to find indictments to two years after the commission of the offense, applies to offenses arising under statutes subsequently passed. So held where defendant had been convicted of a crime under a statute passed subsequent to 1790, and he sued out a writ of *habeas corpus* to review the sentence. *Johnson v. United States*, * 8 McL., 89.

§ 128. The Wisconsin statute of limitation applies to causes of action accrued at the time of its enactment. *Cleveland Ins. Co. v. Reed*, 1 Biss., 180.

§ 129. The repeal of an exception contained in the statute of limitations causes the statute to begin to run from the date of the repeal. So held in an action commenced in 1847 on a writing obligatory and several promissory notes in Arkansas. The plaintiff was a non-resident of the state. The statute in force when the contract was entered into contained an exception in favor of non-residents. This exception was repealed in 1843, and the time was extended by act of 1844 to two years. The action was held to be commenced in time, as the statutory period was five years as to the writing obligatory, and barred as to the notes, the period being three years. *Boyle v. Arledge*, * Hemp., 620.

§ 130. When a statute of limitations contains an exception in favor of non-residents, and, by a subsequent statute, the exception is repealed, the running of the statute is counted as though the exception never existed. The courts will not give effect to such statutes where a reasonable limitation is not left in favor of actions accrued before its passage. *Lewis v. Broadwell*, * 8 McL., 568.

§ 131. By the statute of limitations of 1785 of Vermont the true owner of lands was not barred until the lapse of fifteen years. By the act of 1802, the statute did not run against the true owner of lands held for public, pious or charitable uses. This exception was repealed in 1819. In an action commenced in 1824 to recover certain lands in Vermont by a charitable organization, of which adverse possession had been taken in 1794, the true owner was held not barred. *Society for the Propagation, etc., v. Pawlet*, 4 Pet., 480 (§§ 611-18).

§ 132. Coupons.—The cases of *The City v. Lamson*, 9 Wall., 477, and *The City v. Butler*, 14 Wall., 282, did not intend to decide that the right of action upon an interest coupon cut from a municipal bond was not barred by the statute of limitations until the action upon the bond itself was barred; but only that such coupons partook of the nature of the bonds so far as that the same limitation would apply to them as to the bond itself, although the bond was sealed and the coupons were not, and a different limitation was prescribed for sealed instruments and those unsealed. *Clark v. Iowa City*, * 20 Wall., 583; 9 West. Jur., 118.

§ 133. Bankruptcy.—The two years' limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property. *Payson v. Coffin*, 4 Dill., 386.

§ 134. Distress for taxes due to the city of Washington is not barred by the statute of limitations. *Hogan v. Ingle*, 2 Cr. C. C., 352.

§ 135. Miscellaneous.—The Maryland statute of limitations of twelve years is a bar to an action against the devisee of the obligor, brought in Alexandria upon a bond executed and assigned in Maryland, all the parties having continued to reside in Maryland until the expiration of the twelve years. *Gilpin v. Plummer*, 2 Cr. C. C., 54.

§ 136. A payment of a part of the debt by the executor within the twelve years does not take the case out of the statute as to the heirs and devisees. *Ibid.*

§ 137. The statute of limitations does not apply to *assumpsit* upon open accounts between merchants. *Wilson v. Mandeville*, 1 Cr. C. C., 433.

§ 138. The plea of prescription is inapplicable to a case of pledge or *antichresis* in Louisiana under the civil law. *Livingston v. Story*, 11 Pet., 351.

§ 139. While New Orleans was under the control of the federal army a bill of exchange drawn upon a citizen of that place by a citizen of Mississippi was seized by the commander of the federal forces, and, although such bill was a nullity, collected from the drawee in New

Orleans, and the money confiscated. In an action of *assumpsit* brought to recover damages from such commander for the unauthorized collection, *held*, that the action did not come within the act of March 3, 1863 (12 Stat. at L., 757), which enacts that "no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, . . . by virtue or under color of any authority derived from or exercised by or under the president of the United States, or by or under any act of congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass or wrong may have been done," etc. *Britton v. Butler*, 11 Am. L. Reg. (N. S.), 293; 9 Blatch., 456; 5 Am. L. T., 101; 15 Int. Rev. Rec., 98.

5. State Statute in United States Courts.

SUMMARY—Will follow state decisions, § 140.—Rule in equity cases, § 141.

§ 140. The federal courts will follow the state statute of limitations as construed by the state courts, and, in so far as it affects title to land, will overrule their own decisions in order to conform to the interpretation given by the state courts. So held in an action involving the title to lands in Tennessee, where the United States courts had in 1816 given one interpretation to the state statute of limitations, and in 1825 the state courts adopted a construction inconsistent therewith. *Green v. Neal*, §§ 142-144.

§ 141. The United States courts are not bound to follow as rules of decision, in equity cases, the statutes of limitation of the several states or the construction given to them by the state judiciary. And in cases where they do so by analogy, it is because equity requires it and the statutes are found to be in harmony with its general principles. Thus where the statute of limitations of the state of Missouri barred claims against the estate of a decedent, if not presented within two years, the court refused to follow it, where there had been a fraudulent concealment of the cause of action by the deceased and the fraud was not discovered until seven years after his death. *Johnston v. Roe*, § 145.

[NOTES.—See §§ 146-170.]

GREEN v. NEAL.

(6 Peters, 291-301. 1832.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This writ of error is prosecuted to reverse a judgment of the circuit court for West Tennessee. An action of ejectment was prosecuted by Neal in that court, to recover the possession of six hundred and forty acres of land. The issue was joined, and at the trial the defendant relied upon the statute of limitations, and prayed certain instructions of the court to the jury. Instructions were given as stated in the following bill of exceptions:

"In the trial the plaintiff introduced in evidence a grant from the state of North Carolina, dated —, to Willoughby Williams, for the land in controversy, and deduced a regular chain of conveyances to plaintiffs' lessor, and proved defendant in possession of the land in question at the time suit was brought; defendant introduced a deed from Andrew Jackson to Edward Dillon, and proved that defendant held by a lease from Dillon; and also in support of Dillon's title introduced evidence tending to prove that persons claiming under and for Dillon had been more than seven years in possession of the premises in dispute, adverse to the plaintiffs; upon which the court charged the jury that, according to the present state of decision in the supreme court of the United States, they could not charge that defendant's title was made good by the statute of limitations."

The decision of the point raised by the bill of exceptions in this case is one of great importance, both as it respects the amount of property which may be affected by it, and the principle which it involves. In the case of *Patton v. Easton*, 1 Wheat., 476, which was brought to this court by writ of error in

1816, the same question which was raised by the bill of exceptions was then decided. But it is contended that, under the peculiar circumstances of the case now before the court, they ought not to feel themselves bound by their former decision. This court, in the case of *Powell v. Harman*, 2 Pet., 241, gave another decision, under the authority of the one just named; but the question was not argued before the court.

§ 142. *This court uniformly adopts the decisions of the state courts respectively in the construction of their statutes.*

The question involves, in the first place, the construction of the statutes of limitations passed in 1715 and in 1797. The former was adopted by the state of Tennessee from North Carolina; the third section of which provides "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering or making default shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section provides, after enumerating certain disabilities, and the time within which suit must be brought after they shall cease, that "all possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land."

In the year 1797, the legislature, in order to settle the "true construction of the existing laws respecting seven years' possession," enact "that in all cases, wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person or persons so holding possession as aforesaid shall be entitled to hold possession in preference to all other claimants, such quantity of land as shall be specified in his, her, or their said grant or deed of conveyance, founded on a grant as aforesaid." This act further provides that those who neglect, for the term of seven years, to assert their claim, shall be barred.

This court, in the conclusion of their opinion in the case of *Patton v. Easton*, 1 Wheat., 481, say, "this question, too, has at length been decided in the supreme court of the state. Subsequent to the division of opinion on this question in the circuit court, two cases have been decided in the supreme court for the state of Tennessee, which have settled the construction of the act of 1797. It has been decided that a possession of seven years is a bar only when held under a grant, or a deed founded on a grant." The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be 'founded on a grant' which gives a title not derived in law or equity from that grant, and the words 'founded on a grant' are too important to be discarded."

The two decided cases, to which reference is made above, are *Lillard v. Elliott*, and *Douglass v. Bledsoe's Heirs*. These cases were decided in 1815; and this court considered that they settled the construction of the statute of 1797. But it is now made to appear that these decisions were made under such circumstances that they were never considered, in the state of Tennessee, as fully settling the construction of the act.

In the case of *Lillard v. Elliott* it seems but two judges concurred on the point, the court being composed of four; and in the case of *Weatherhead v. Bledsoe*, 2 Overt., 352, there was great contrariety of opinion among the judges on the point of either legal or equitable connection. The question was frequently raised before the supreme court of Tennessee; but the construction of the two statutes of limitations was never considered as finally settled until 1825, when the case of *Gray v. Darby*, Mart. & Yerg., 396, was decided.

In this cause an elaborate review of the cases which had arisen under the statute is taken, and the construction of both statutes was given, that it is not necessary, to entitle an individual to the benefits of the statutes, that he should show a connected title, either legal or equitable. That if he prove an adverse possession of seven years under a deed, before suit is brought, and show that the land has been granted, he brings himself within the statutes.

Since this decision the law has been considered as settled in Tennessee, and there has been so general an acquiescence in all the courts of the state, that the point is not now raised or discussed. This construction has become a rule of property in the state, and numerous suits involving title have been settled by it.

Had this been the settled construction of these statutes when the decision was made by this court in the case of *Patton's Lessee v. Easton* there can be no doubt that that opinion would have conformed to it. But the question is now raised whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court on a question of general importance. The cases are numerous where the court have adopted the constructions given to the statute of a state by its supreme judicial tribunal; but it has never been decided that this court will overrule their own adjudication, establishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the state at the time, so as to conform to a different construction adopted afterwards by the state.

This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point of view in which it may be considered. As a rule of property it is important, and equally so as it regards the system under which the powers of this tribunal are exercised. It may be proper to examine in what light the decisions of the state courts, in giving a construction to their own statutes, have been considered by this court. In the case of *M'Keen v. Delancy*, 5 Cranch, 22, this court held that the acknowledgment of a deed before a justice of the supreme court, under a statute which required the acknowledgment to be made before a justice of the peace, having been long practiced in Pennsylvania, and sanctioned by her tribunals, must be considered as within the statute.

The chief justice, in giving the opinion of the court in the case of *Bodley v. Taylor*, 5 Cranch, 221, says, in reference to the jurisdiction of a court of equity: "Had this been a case of the first impression, some contrariety of opinion would, perhaps, have existed on this point. But it has been sufficiently shown that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received in its origin the sanction of the court of appeals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions, as to be incorporated into their

system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken."

In the case of *Taylor v. Brown*, 5 Cranch, 255, the court say, in reference to their decision in the case of *Bodley v. Taylor*: "This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate, especially, the same rule ought certainly to prevail in both courts." This court, in laying down the requisites of a valid entry, in the case of *Massie v. Watts*, 6 Cranch, 165, say: "These principles have been laid down by the courts, and must be considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them."

In 9 Cranch, 98, the court say that "in cases depending on the statute of a state, and more especially in those respecting titles to lands, the federal courts adopt the construction of the state, where that construction is settled and can be ascertained." And in 5 Wheat., 279, it is stated that "the supreme court uniformly acts under a desire to conform its decisions to those of the state courts on their local laws."

The supreme court holds in the highest respect decisions of state courts upon local laws forming rules of property. 2 Wheat., 316. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the state tribunals. 6 Wheat., 119. The court say, in the case of *Elmendorf v. Taylor et al.*, 10 Wheat., 152, "that the courts of the United States, in cases depending on the laws of a particular state, will, in general, adopt the construction which the courts of the state have given to those laws." "This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In 7 Wheat., 361, the court again declare that "the statute laws of the states must furnish the rule of decision to the federal courts, as far as they comport with the constitution of the United States, in all cases arising within the respective states; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of such statute law." The court again say, in 12 Wheat., 153, "that this court adopts the local law of real property, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of the statutes of the state or form a part of the unwritten law of the state, which has become a fixed rule of property."

Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the state tribunals, respectively, in the construction of their statutes. That this has been done as a matter of principle in all cases where the decision of a state court has become a rule of property. In a great majority of the causes brought before the federal tribunals they are called to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope.

§ 143. *Where a statute of a state has been construed by this court and is subsequently construed differently by the highest tribunal of the state, this court will overrule its decision and adopt the construction made by such state court.*

It is admitted in the argument that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but it is contended that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a state, is the court of that state, being so constituted by the constitution and laws of the Union; and as such has an equal right with the state courts to fix the construction of the local law.

On all questions arising under the constitution and laws of the Union this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court in the case of *Shelby v. Guy*, 11 Wheat., 361, "a fixed and received construction by a state, in its own courts, makes a part of the statute law."

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a state as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the state, two rules of property.

Would not a change in the construction of a law of the United States by this tribunal be obligatory on the state courts? The statute as last expounded would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the state and its inferior judicial tribunals. It is emphatically the law of the state, which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it.

If the construction of the highest judicial tribunal of a state forms a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construc-

tion, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made. This constitutes the rule of property within the state by which the rights of litigant parties must be determined.

As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed.

§ 144. — *this principle applied to the statute of limitations of 1815 and 1797, in force in Tennessee. (a)*

The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee that an adverse possession of seven years, under a deed for land that has been granted, will give a valid title. But by the decision of this court such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It therefore follows that the occupant whose title is protected under the statutes before a state tribunal is unprotected by them before the federal court. The plaintiff in ejectment, after being defeated in his action before a state court on the above construction, to insure success has only to bring an action in the federal court. This may be easily done by a change of his residence, or a *bona fide* conveyance of the land.

Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a state.

In several of the states the English statute of limitations has been adopted with various modifications; but in the saving clause the expression "beyond the seas" is retained. These words in some of the states are construed to mean "out of the state," and in others a literal construction has been given to them.

In the case of *Murray v. Baker*, 3 Wheat., 541, this court decided that the expressions "beyond seas," and "out of the state," are analogous, and are to have the same construction. But suppose the same question should be brought before this court from a state where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it? And might not the same arguments be used in such a case as are now urged against conforming to the local construction of the law of Tennessee? Apparent inconsistencies in the construction of the statute laws of the states may be expected to arise from the organization of our judicial systems; but an adherence by the federal courts to the exposition of the local law, as given by the courts of the state, will greatly tend to preserve harmony in the exercise of the judicial power in the state and federal tribunals. This rule is not only

(a) Reversing *Patton v. Easton*,* 1 Wheat., 476, and *Powell v. Harman*,* 2 Pet., 241.

recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority.

As it appears to this court that the construction of the statutes of limitations is now well settled, differently from what was supposed to be the rule at the time this court decided the case of *Patton v. Easton*, 1 Wheat., 476, and the case of *Powell v. Harman*, 2 Pet., 241; and as the instructions of the circuit court were governed by these decisions and not by the settled law of the state, the judgment must be reversed and the cause remanded for further proceedings.

BALDWIN, J., dissented.

JOHNSTON v. ROE.

(Circuit Court for Missouri: 1 McCrary, 162-166. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—The claim sued on originated in the execution of two promissory notes by John J. Roe, one dated February 28, 1867, for \$65,000, and the other dated March 4, 1867, for \$35,000, payable on call and to himself. The fraud and breach of trust charged against said John J. Roe as a director of the National Bank of the State of Missouri is alleged to have been committed on the 14th day of April, 1868, and consisted, as the bill avers, in certain entries upon the books of said bank made by said Roe, who was one of the directors, in collusion with the other directors of the bank. It is averred that said notes, and other similar notes given by other directors, had been discounted by the bank, and were held by it as part of the assets, and that on the date last named entries were fraudulently made upon the books of the bank showing payment thereof, though no part of said notes, or either of them, except interest up to that time, had been paid, and no payment thereon has been since made. This of course makes, if true, a clear case of indebtedness from said Roe to the bank. The indebtedness, according to these allegations, accrued as early as the 14th day of April, 1868. John J. Roe died on the 14th day of February, 1870. His estate was administered upon under the laws of Missouri, and this claim was not proven before the probate court. Said estate has been fully administered by the administrator, and the administration closed. Certain real and personal property left by the deceased having passed to the defendants herein, as his heirs, this suit is intended to subject the same to the payment of the plaintiff's demand, the bill for this purpose having been filed on the 17th day of June, 1879.

It will thus be seen that the cause of action accrued nearly two years before the death of John J. Roe, and more than ten years prior to the bringing of this suit, and is therefore barred by the statute of limitations of Missouri (if that statute is to be followed here), unless the plaintiff has taken the case out of the statute by the allegations of his bill concerning the concealment of the alleged fraud and its discovery. Upon this point the bill alleges, in substance, that the fraud complained of was concealed by the directors of the bank (said John J. Roe up to the time of his death being one of them), in collusion with the cashier, whereby the said national bank and its stockholders and creditors were kept in ignorance of the facts until July 10, 1877, when the fraud was discovered by the complainant. It is further alleged that the claim here sued upon arises out of the breach of an express trust by the said John J. Roe and

his associates, and for that reason said statute of limitations does not affect the complainant's right of recovery herein, and it is alleged generally "that, in consequence of said fraud, and the concealment thereof as aforesaid, the claim here sued upon is, in equity, excepted from the operation of the statute of limitations, in order to prevent such statute from operating as a fraud upon said bank, and your orator, as receiver thereof."

I am of the opinion that there is a sufficient averment in the bill of a fraudulent concealment of the cause of action, and the question, therefore, is whether, notwithstanding such concealment, the defendants can successfully plead the statute of limitations.

The statute of Missouri concerning administration requires the presentation of all claims against an estate within two years from the time of the publication of a notice of the administration to creditors, and it declares that "all demands not thus exhibited within two years shall be forever barred." There is a saving clause in favor of infants, persons of unsound mind, persons imprisoned and married women, but nothing is said as to cases of concealed fraud. 2 Wagner's St., 68, 102. The general statute on the subject of the limitation of actions provides that, in an action for relief on the ground of fraud, the cause of action shall be deemed not to have accrued until the discovery of the fraud by the aggrieved party. 1 Wag. St., 747.

It is earnestly contended, on behalf of the respondents, that, according to the construction placed by the supreme court of Missouri upon these statutes, the action is barred, notwithstanding the discovery of the fraud within two years. Upon this subject counsel insist: *First*. That the statute regulating the prosecution and collection of claims against an estate absolutely bars all demands not exhibited within two years, and that, since no exception is made by the statute itself in favor of demands growing out of concealed fraud, the court is not at liberty to engraft this exception upon the statute. *Second*. That the general statute of limitations, which does contain a provision declaring that in actions on the ground of fraud the cause of action shall be deemed not to have accrued until discovery by the aggrieved party, does not apply to this case.

§ 145. *Federal courts of equity are not bound by rulings of state courts on state statutes of limitation.*

Upon the first proposition, we are referred to *McKenzie v. Hall*, 51 Mo., 303; *Richardson v. Harrison*, 36 Mo., 96; and upon the second, to *Rogers v. Bronson*, 61 Mo., 187. Without determining whether these authorities sustain the proposition stated, we turn to another inquiry, which necessarily requires prior consideration. Is it true that the courts of the United States are bound to follow, as rules of decision in equity cases, the statutes of limitation of the several states, and the construction given to them by the state judiciary? It is insisted that, under the twenty-fourth section of the judiciary act (R. S., § 721), the statutes of limitation of the several states, where no special provision has been made by congress, form the rule of decision in the courts of the United States, and that the same effect is given to them as is given in the courts of the state. Such is undoubtedly the rule in cases at common law, and the statute, by its terms, applies to no other cases. I think it well settled that a federal court of equity is not bound by such statutes, and much less by the construction given to them by the state tribunals. In the exercise of the chancery jurisdiction conferred by the constitution and laws of the United States, this court is not governed by the state practice. The supreme court has repeatedly decided that the rules governing the exercise of this jurisdiction are

the same in all the states, and are according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law. The exercise of this jurisdiction is regulated by the act of 1792 (R. S., § 913), which declares that the modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. The rules of decision in equity cases in the federal courts are to be uniform, and in the exercise of their equity jurisdiction those courts are unaffected by state legislation. *Boyle v. Zacharie*, 6 Pet., 658 (JUDG., §§ 1473-77); *United States v. Howland*, 4 Wheat., 115; *Neves v. Scott*, 13 How., 271; *Noonan v. Lee*, 2 Black, 507; *Robinson v. Campbell*, 3 Wheat., 323.

The only question, therefore, is whether this court should, upon principle, adopt and follow the statute of limitations of Missouri as construed by the supreme court of that state. If the interpretation given to the rulings of the supreme court of Missouri by the counsel for defendants is the true one, I do not hesitate to say that this court cannot follow those rulings. The statute, thus construed, would be in direct conflict with a well-settled rule of equity jurisprudence as understood and administered in the federal courts for many years. It would require this court to hold that, in a case where the demand happens to be against an estate, a party who has committed a fraud may consummate it beyond the possibility of remedy by concealing it. This seems to me to be a proposition that no court of equity can, with propriety, maintain, if left free, as this court is, to consider it upon the merits. In cases where the federal courts follow in equity the state statutes of limitation by analogy, they do so because equity requires it and the statutes are found to be in harmony with its general principles.

The rule that the statute of limitations does not run in favor of one who perpetrates a fraud while he conceals it from the party injured, as a general doctrine of equity jurisprudence, is too well settled to require the citation of authorities. The demurrer to the bill is overruled.

§ 146. In general.—The federal courts will follow the state statute of limitations and the construction given to it by the state courts unless it conflicts with the constitution or an act of congress. *Elmendorf v. Taylor*, 10 Wheat., 168; *Harpending v. The Dutch Church*, 16 Pet., 455; *McCluny v. Silliman*,* 3 Pet., 270; *Murray v. Gibson*, 15 How., 421; *Nicolls v. Rodgers*,* 2 Paine, 487; *Boyle v. Arledge*,* *Hemp*, 620.

§ 147. Federal courts are bound to pay the same regard to the statutes of states limiting the time within which actions may be brought as is paid them by the state courts. *In re Eldridge*, 9 Hughes, 256.

§ 148. Unless congress otherwise provides, state statutes of limitation are applicable to controversies in the courts of the United States with the same effect as they would have if the controversy were pending in the courts of the state. *Martin v. Smith*, 1 Dill., 85 (§§ 405-11).

§ 149. The statute of limitations which controls in a case where injury to an easement is committed is that of the jurisdiction within which the injurious act is done. *Stillman v. White Rock Manuf. Co.*, 3 Woodb. & M., 539.

§ 150. The construction given by the supreme court of a state to the statute of limitations of the state will be followed by this court in a case in which the United States circuit court decided otherwise before the state decision was made. *Moore v. National Bank*, 14 Otto, 625.

§ 151. A statute of limitations of a state relating to the time of bringing suits in equity has no application in the federal courts of equity. *Hall v. Russell*, 3 Saw., 506.

§ 152. The construction given to a statute of limitations by the supreme court of a state will be followed by the federal courts. *Sampler v. The Bank*, 1 Woods, 528.

§ 153. The state statute which gives special powers to state courts to allow a redemption after twenty years' limitation will govern the practice in the United States circuit court. *Dexter v. Arnold*, 8 Sumn., 152.

§ 154. In ordinary actions at law in the United States courts, the statutes of limitation of

GENERAL PRINCIPLES.—STATE STATUTE IN UNITED STATES COURTS. §§ 155-168.

the state where the suit is brought may be pleaded under the provisions of the thirty-fourth section of the judiciary act. *Read v. Miller*, 2 Biss., 12.

§ 155. This court will administer statutes of limitation of the state as rules of property. *Cleveland Ins. Co. v. Reed*, 1 Biss., 184.

§ 156. The federal courts, sitting within the respective states, regard their statutes of limitation and give them the interpretation and effect which they receive in the courts of the state. *In re Cornwall*, 9 Blatch., 127.

§ 157. Limitation is as applicable in the national as in the state courts. *Scovill v. Shaw*, 4 Cliff., 567.

§ 158. Under section 84 of the judiciary act of 1789, which provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply," the acts of limitation of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. *Parker v. Hawk*,* 2 Fish. Pat. Cas., 58.

§ 159. Patents.—In the absence of an act of congress, the state statute of limitations, where applicable, will affect actions arising under the patent law. Thus where an action was brought on a patent, and, at that time, there was no limitation prescribed by act of congress, and the defendant pleaded the state statute, that of New York, it was held to be a good defense. *Rich v. Ricketts*,* 7 Blatch., 280.

§ 160. Whether the state statute of limitations applies to a suit brought in a federal court by a patentee of an invention against an infringer of the patent, to compel such infringer to account for profits received, *quære?* *Stevens v. Kansas Pacific R'y Co.*, 5 Dill., 486.

§ 161. In an action for infringement of letters patent, *held*, that the state statute of limitations did not apply, but that congress having fixed the date in patent cases, whereof the federal government has exclusive jurisdiction, the congressional limitation must govern. *Hayward v. City of St. Louis*, 3 McC., 614.

§ 162. The statute of limitations of the state of Ohio bars all actions on the case unless brought within six years from the time the cause of action accrued. *Held*, in an action on the case, brought under the patent laws of the United States, for an infringement of a patent right in the state of Ohio, that the plea of the statute of limitations of that state was a good plea. *Parker v. Hawk*,* 2 Fish. Pat. Cas., 58.

§ 163. State statutes cannot limit the time within which actions for the infringement of letters patent may be brought in the courts of the United States. Congress having failed to legislate upon this subject, there is no limit to the time for bringing such actions. *Collins v. Peebles*,* 2 Fish. Pat. Cas., 541, 543 (note).

§ 164. The constitution of the United States having given to the national government exclusive control of the whole subject-matter of patent rights for new and useful inventions, no state can pass any valid law concerning them, and for that reason no state statute of limitations can be pleaded in bar to an action for the infringement of a patent. *Read v. Miller*,* 3 Fish. Pat. Cas., 310.

§ 165. Rights of action for the infringement of patents arise exclusively under the constitution and laws of the United States, the form of the remedy is prescribed by the acts of congress, and the circuit courts of the United States are clothed by statute with exclusive jurisdiction over the whole subject-matter; hence the statutes of limitation of the state in which the suit for the infringement is brought cannot be pleaded in bar of the action. *Anthony v. Carroll*,* 9 Off. Gaz. Pat., 199; 2 Bann. & A. Pat. Cas., 195.

§ 166. Should the legislature of a state pass an act in express terms limiting the time for bringing an action in the federal courts for infringement of patent rights, there can be no reasonable doubt that such a statute would be unconstitutional and void. *Ibid*.

§ 167. Miscellaneous.—A federal court will be governed by the statute of limitations of the state in which the suit is brought. And where such statute provides that a suit for relief on the ground of fraud must be brought within three years from the time the cause of action accrued, and that the cause of action shall not be deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud," a demurrer to the bill will be sustained when it appears that the acts were performed more than three years before the commencement of the suit, unless it is also averred that the facts constituting the fraud were not discovered till within three years. *Dannmeyer v. Coleman*, 11 Fed. R., 97.

§ 168. A suit was brought for the loss of a package of gold by an express company; the judge charged that under the statute of Nebraska, if the defendant corporation has a managing agent in the state when the cause of action accrued, and has such agent for five years after that time, the action is barred; according to the state statute, if process were served on such

managing agent, the judgment obtained would bind the company. It was held that there was no error. *Express Company v. Ware*, * 20 Wall., 643.

§ 169. In Wisconsin, the statute of limitations, as construed by the state courts, may be set up by demurrer; this construction is binding on the United States courts. *Chemung Canal Bank v. Lowery*, 3 Otto, 72 (§§ 5, 6).

§ 170. Upon libel filed in a United States district court against the owners of a vessel for labor performed thereon, *held* that, although not bound by the state statute of limitations, the court was inclined to follow its analogies; and that more than six years having elapsed since the cause of action accrued, the commencement within that time, in the state court, of a suit in equity, which was subsequently discontinued, did not excuse the delay, especially as there was good reason to believe that the owners had been prejudiced by the delay. *Hall v. Hudson*, 2 Spr., 65.

6. *Miscellaneous Principles.*

SUMMARY — *A statute of limitations may impliedly exclude foreign contracts*, § 171.

§ 171. A statute discharging contracts or denying suits thereon, without the particular mention of foreign contracts, does not include them. A statute barring creditors of insolvent decedents after certain proceedings does not affect a non-resident creditor unless he becomes a party to the proceedings. So held in an action brought in Alabama on a note made in New York, the payee being resident in that state, against the administrators of the maker. The statute of Alabama directs that after certain proceedings an estate may be declared insolvent and the funds divided *pro rata* among the creditors. This statute was pleaded by defendant. It was held that the plea was insufficient. *Suydam v. Broadnax*, §§ 172, 173.

[NOTES.— See §§ 174-199.]

SUYDAM v. BROADNAX.

(14 Peters, 67-76. 1840.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.— This case has been sent to this court upon a certificate of division of opinion between the judges of the circuit court of the southern district of Alabama. Suydam and Boyd, partners in trade, citizens of the state of New York, sue the defendants as administrators of David Newton, upon a promissory note given by the intestate to the plaintiff, dated New York, September 1, 1835, payable in twelve months. The defendants, as we are left to gather from a most imperfect record — for the pleadings, except the declarations, are not given — plead in abatement of the suit that the estate represented by them has been declared, under proceedings of a statute of Alabama, to be insolvent; and, in such a case, that they are not liable to be sued. The judges of the circuit court were opposed in opinion upon the question: "Is the plea that the estate of the said deceased is insolvent sufficient in law to abate the said action?"

The statute of Alabama will be found in Aikin's Digest of the Laws of Alabama, 157. The second section of it declares that the estates of persons altogether insolvent shall be distributed among the creditors in proportion to the sums respectively due, after the payment of debts due for the last sickness and necessary funeral expenses. For the purpose of ascertaining such insolvency, the executor is permitted to exhibit to the orphans' court an account and statement of the effects of the estate, including in it also the lands, tenements and hereditaments of the testator or intestate; and if it shall appear to the orphans' court that such estate is insolvent, then, after ordering the lands, tenements and hereditaments of the testator or intestate to be sold, the court shall appoint two or more commissioners, with power to receive and examine the claims of creditors of the estate; and the commissioners are directed to

give notice of the times and places of their meeting, by notifications posted up in such public places, and in such newspapers, as the orphans' court or chief justice thereof may direct. Six months, and not more than eighteen months, shall be allowed by the court to creditors to bring in and prove their claim before the commissioners. The commissioners, at the end of the time limited, are to make a report on oath to the orphans' court of all the claims which have been laid before them, with the sums allowed by them on each respective claim. The court then shall order the residue of the estate, personal and real, the real estate being sold according to law, to be paid and distributed among the creditors whose claims have been allowed by the commissioners in proportion to the sums respectively due. Provision is then made, either at the instance of a creditor, or executor or administrator, either being dissatisfied with the report on a particular claim, under an order of the orphans' court, to refer that claim to a court of referees, whose report upon it, when returned to the orphans' court and approved, is declared to be final and conclusive. And it is further declared that no suit or action shall be commenced or sustained against any executor or administrator after the estate is represented insolvent, except in certain cases not necessary to be now noticed. But the statute further provides for the liability of the executor or administrator to the creditors for their respective shares in the distribution; and then declares that the claims of creditors which have not been put before the commissioners within the time limited, or which have not been allowed in the other modes directed by the statute, shall be forever barred; unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator before distribution.

Is then the insolvency of the estate, judicially declared under the statute, sufficient in law to abate the suit of the plaintiff? We think such an insolvency cannot abate the action upon which this division of opinion has been certified to this court. The statute itself contains a provision which meets the question. The sixth section declares that "all claims against the estates of deceased persons shall be presented to the executor or administrator within eighteen months after the same shall have accrued," "or within eighteen months after letters have been granted, and not after; and all claims not presented within that time shall be forever barred from recovery;" but excepts, among other exceptions, debts contracted out of Alabama. Now, if an estate may be declared insolvent under the statute in less than the longest time allowed to creditors to present their claims, and creditors for debts contracted out of the state are not limited to that time to present their claims, it follows, as a necessary consequence, that an estate having been declared to be insolvent within the shorter time cannot exclude such creditor from maintaining a suit against the executor or administrator. And in cases of insolvency, declared after eighteen months, creditors of debts contracted out of the state cannot be included in the exclusion from the right to sue; for no time is limited for such claims to be presented; and, in an action to enforce them, a recovery can only be prevented by such defenses as would prevail in any other suit.

We think this a conclusive interpretation of the sixth section; and on this ground that the plea of the estate being insolvent is not sufficient to abate this action. But if the sixth section was not in the statute, our opinion would be the same from the rule which must be applied to interpret such a statute. Statutes are mandatory, except of the established rules for the interpretation of them.

§ 172. *A statute discharging contracts or denying suits thereon, without particular mention of foreign contracts, does not include them.*

This is a statute which, by the exemption it gives to executors and administrators from suit, would seem to imply a denial to creditors of the intestate the right to sue without respect to the foreign country or state in our own Union where the debt was contracted. It is a general statute, without a direct application to contracts made out of Alabama; and its construction cannot be extended to such contracts. *Ratio est, quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum.* Casaragis Disc., 130, §§ 14-16, 20, 22. A sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens wherever made, and discharge them by denying a right of action upon them in its courts. But the validity of such contracts as were made out of the sovereignty or state would exist and continue everywhere else, according to the *lex loci contractus*. This shows the reason for and force of the rule just given; and it may be laid down as a safe position, that a statute discharging contracts or denying suits upon them, without the particular mention of foreign contracts, does not include them.

§ 173. *A statute of a state barring creditors of insolvent estate of a deceased may not bar a creditor who is a citizen of another state.*

We do not mean, however, to decide this question solely by the interpretation which has been given to the statute. It may be put upon other grounds, making our conclusion equally certain. They are such as are connected with the constitutional and legal rights of the plaintiffs to sue in the circuit courts of the United States; and upon the law which under our system does not permit an act of insolvency, completely executed under the authority of one state, to be a good bar against the recovery upon a contract made in another state.

The eleventh section (1 Stats. at Large, 78) of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States, and gives to the circuit court "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, and in equity," etc., etc. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court. The division of opinion, too, as it is presented in the record, is brought within the decisions of this court in *Sturges v. Crowninshield*, 4 Wheat., 122 (Const., §§ 1937-39) and *Ogden v. Saunders*, 12 id., 213 (Const., §§ 1940-2003). It must be remarked, however, that the statute of Alabama is one for the distribution of insolvent estates, not liable to the objections of a general law, and is only brought under the cases mentioned by an attempt to extend its provisions to a citizen of another state.

In *Sturges v. Crowninshield* it is said: "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected are entitled to a hearing. Hence, any bankrupt or insolvent system professes to summon the creditors before some tribunal to show cause against granting a discharge to the bankrupt. But on what prin-

iple can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights, and on the subject of those rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate." In *Ogden v. Saunders*: "A bankrupt or insolvent law of any state which discharges both the person of the debtor and his future acquisitions of property is not a law impairing the obligation of contracts, so far as respects debts contracted subsequently to the passage of the law. But a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained."

Though this is a statute intended to act upon the distribution of insolvent estates, and not a statute of bankruptcy, whatever exemption it may give from suit to an executor or administrator of an insolvent estate against the citizens of Alabama, a citizen of another state, being a creditor of the testator or intestate, cannot be acted upon by any proceedings under the statute, unless he shall have voluntarily made himself a party in them, so as to impair his constitutional and legal right to sue an executor or administrator in the circuit court of the United States.

Let it then be certified to the circuit court of the United States for the southern district of Alabama, as the opinion of this court, that the plea that the estate of the decedent is insolvent is not sufficient in law to abate the plaintiffs' action.

§ 174. When action rather than cause of action is barred.—The plaintiff in error brought an action on the case against the defendant, as register of a United States land office in Ohio, for damages for refusing to enter certain lands for him, he having produced the receipts of the receiver of public moneys for the money paid therefor. The defendant pleaded the limitation of six years, that being the limitation prescribed by the Ohio statute for "actions on the case." The plaintiff was not a resident of Ohio. It was held that where a statute provides that an action by its technical denomination instead of the cause of action shall be barred, etc., every cause for which that action may be brought is within the statute, the statute barring the remedy by that particular form of action if not prosecuted within the time limited. *McCluny v. Silliman*,* 8 Pet., 270.

§ 175. An action of debt was brought to recover a penalty imposed by an act of congress prohibiting the slave trade. (1 Stat. at Large, 347.) It was pleaded in bar that the offense had not been committed within two years previous to the institution of the suit. *Held*, that this plea was good; that the limitation created by the act of 1790 was not limited to any particular form of action, but extended to any prosecution under any penal statute. *Adams v. Woods*,* 2 Cr., 336.

§ 176. The statute affects the remedy but not the right.—The statute of limitations bars the remedy but does not extinguish the debt. The fact that the remedy at law is barred does not extinguish the remedy in equity on a collateral security. In an action to foreclose a mortgage, a demurrer was filed on the ground that the mortgage was given to secure the payment of a note which was barred by the statute of limitations. The demurrer was overruled. *Sparks v. Pico*, 1 McAl., 497 (§§ 445-46).

§ 177. The statute of limitations does not operate to extinguish debts but to bar the remedy. A creditor may hold to a security or lien though the statute has run. *Brent v. Bank of Washington*, 10 Pet., 596.

§ 178. Statutes of limitation only act on the remedy and do not impair the obligation of the contract. They only furnish presumptive evidence that the contract has been fulfilled. *Ogden v. Saunders*, 12 Wheat., 213; *In re English*, 6 Fed. R., 277.

§ 179. Amendment.—Where by amendment by a second count a new title is alleged the statute of limitations runs until the time of amendment. *Sicard v. Davis*, 6 Pet., 124.

§ 180. When a new demise is laid adverse possession is to be computed from that date back. *Wilkes v. Elliot*, 5 Cr. C. C., 614.

§ 181. An amendment of a bill that sets up a new title is to be regarded as the beginning of a new suit so far as affects the statute of limitations. *Holmes v. Trout*, 1 McL., 9.

§ 182. An action commenced in time is not barred because amended after limitation. *McGlinchy v. United States*, 4 Cliff., 319.

§ 183. Defendant not allowed to plead statute of limitation after expiration of rule to plead. *Bank of Columbia v. Hyatt*, 4 Cr. C. C., 38.

§ 184. An amendment will not be allowed to introduce a new cause of action which of itself is barred by the statute of limitations. *Schooner Harmony*, 1 Gall., 124.

§ 185. Computation of time.—In questions of laches and the statute of limitations the commencement of the suit and not the date of the trial is the period to be considered. *Bird v. Louisiana St. Bk.*, 3 Otto, 96.

§ 186. The words "right accrued" in statute of limitations mean a new right accruing to party. *Ricard v. Williams*, 7 Wheat., 117.

§ 187. The California statute of limitations applies both to legal and equitable remedies. It is directed to the subject-matter and not to the form of the action. *Hardy v. Harbin*, 4 Saw., 536.

§ 188. Legal title.—The statute of limitations can only run against the legal title. *Dubois v. McLean*, 4 McL., 486.

§ 189. Neglect to prosecute, because the party believed he had no rights, is no defense at law, except under the statute of limitations, pleaded and relied upon. *Taylor v. Carpenter*, 2 Woodb. & M., 1.

§ 190. *Scire facias*.—The statute of limitations can be pleaded to a *scire facias* issued to revive a judgment. A *scire facias* was issued to revive a judgment and one of the defendants pleaded the statute of limitations, to which plea plaintiff demurred. The demurrer was overruled. *Simpson v. Lassalle*,* 4 McL., 352.

§ 191. In a *scire facias* to revive a judgment in ejectment, where it is stated that the term recovered is expired, this is sufficient. It is not necessary to make executors or administrators of deceased defendants parties. *Walden v. Craig*, 14 Pet., 147.

§ 192. Plaintiff cannot upon writ of error claim that though the statute of limitations barred his claim on some of the defendants it did not as to others, he not having made that point on the trial below. *Scott v. Ratliffe*, 5 Pet., 81.

§ 193. Bill of review must be brought in five years or it is barred by limitation. *Whiting v. Bank of United States*, 13 Pet., 6.

§ 194. The statute in force at the time suit is brought determines the right to sue. *Patterson v. Gaines*, 6 How., 550.

§ 195. Executors.—Under the law of Virginia an executor is not obliged to plead the statute of limitations when sued and may pay a judgment obtained against him on a claim which the statute would have barred. *West v. Smith*, 3 How., 402.

§ 196. Debtor not bound to plead.—It cannot be said ordinarily that a debtor is bound to plead the statute of limitations. He may do so in proper cases, but is not bound to plead it. *Scott v. Shreeve*, 12 Wheat., 605.

§ 197. Judgments.—The plea of the statute of limitations to a judgment as being of twelve years' standing is not good if it has been revived within the twelve years, and twelve years have not elapsed since its revival. *Jackson v. Bank of the United States*, 5 Cr. C. C., 1.

§ 198. Plea regarded with favor.—Upon demurrer to the declaration being overruled the defendant, having obtained leave to plead without any qualification except as advised, interposed a plea of the statute of limitations, which the court afterwards struck out upon the application of the plaintiff, and upon affidavits furnished by the latter explaining and sustaining his cause of action. *Held*, that the court should have allowed the plea to stand, as the plea of the statute of limitations is now regarded with the same favor as other defenses. *Knoedler v. Meloy*,* 2 MacArth., 203.

§ 199. Repeal of statute after bar.—When a statute of limitation has run so long against a cause of action as to become a perfect bar, the repeal of the statute does not destroy the bar. *Baldro v. Tolmie*,* 1 Oreg., 176.

II. WHEN THE STATUTE BEGINS TO RUN.

SUMMARY—*Negligence of attorney*, § 200.—*Coupons*, § 201.—*Fraud*, § 202.—*Indorsee*, § 203.—*Married women; right of entry*, § 204.—*In favor of one in possession*, § 205.—*Stockholders*, § 206.—*Trustee*, § 207.

§ 200. The plaintiffs had placed in the hands of defendant's testator, an attorney-at-law, a promissory note for collection. He instituted a suit in 1820 against the drawer without mak-

ing the indorser a party. The drawer proved insolvent. In 1821 he issued a writ against the indorser, but committed a fatal misnomer of the plaintiffs, on account of which they were nonsuited in the court of last resort. Before that time (1822) the note was barred. This suit was commenced in January, 1825. The declaration consisted of two counts: one for delay in suing until the note was barred, and the second for negligence on account of the misnomer, but both placed damages on the barring of the note. The statute created a bar within three years. It was held that the first cause accrued within a reasonable time after the note was placed in the attorney's hands, or after his failure to collect from the maker; and on the second at the time of committing the mistake, irrespective of the time when the actual damage accrued. *Wilcox v. Plummer*, § 208.

§ 201. Actions upon coupons accrue when they become payable, whether previously severed from the bond or not. So held in an action upon sundry interest coupons annexed to bonds, issued by the city of Dubuque in 1857. The interest was payable semi-annually on the presentation and surrender of the coupons. The coupons had not been severed from the bonds to which they were annexed. (a) *Amy v. Dubuque*, §§ 209-11.

§ 202. In cases of fraud, the right of action accrues and the statute of limitations begins to run from the time when the fraud is consummated. So held in an action against a collector of customs for duties illegally exacted, where it was claimed that plaintiffs were induced not to institute suits by fraudulent statements and promises by various customs officials and the secretary of the treasury. *Andreae v. Redfield*, §§ 212-16.

§ 203. The statute of limitations does not begin to run in favor of intermediate indorsers of a draft on which the payee's name is forged, and against the drawee, until their titles fail. On March 16, 1867, the treasurer of the United States drew a draft on the First National Bank of Baltimore, a government depository, payable to the order of William Orndorff. This draft, the indorsement of Orndorff having been forged, was forwarded by another bank with its own indorsement to the plaintiff in error for collection. On March 22d it was paid by the defendant, the plaintiff having first indorsed it. The United States subsequently credited the defendant with the amount. In 1877 the United States withdrew this credit, and obtained judgment against the defendant, in a suit of which plaintiff was notified, on the ground that the indorsement was invalid. In an action by defendant against plaintiff, as indorser, to which it pleaded the Maryland statute of limitations of three years, it was held that the statute did not begin to run until the indorser's title failed, which was when the United States withdrew its credit. *Merchants' Nat. Bank v. First Nat. Bank*, § 217.

§ 204. In Illinois, under the statute of 1861, the right of entry in a married woman, married before its passage, accrues, and the statute of limitations begins to run against her, when the husband's life estate is barred. So held in an action of ejectment commenced in 1872 to recover certain lands in Illinois, of which William M. O'Hara died seized in 1821, and the title subsequently vested in his daughter Helen, as sole surviving heir. In 1840 she married Abram D. Harrel, who died in 1871. In 1868 they both conveyed to plaintiff. Since 1857 the defendants have been in possession by actual residence under color of title. The statute of 1839 does not bar *femes covert* until three years after the termination of the disability. The act of 1861 gave to women married after its passage the same right in property as a *feme sole*, and to women married before its passage the same right in property subsequently acquired. The life estate of Harrel was barred in 1864. The limitation provided by the statute was seven years. *Kibbe v. Ditto*, §§ 218-21.

§ 205. The statute of limitations does not run in favor of a person in possession where there is no right of entry in any one who can oust him. Possession is not adverse to an execution purchaser until he has a title and right of action. The statute does not run against a lien creditor until he has a right of action. So held in an action of ejectment commenced in May, 1869. The plaintiff claimed under a deed from a sheriff, executed in February, 1865, on a sale which took place in July, 1863. The sale was under an execution issued on a judgment recovered in August, 1857. *Pratt v. Pratt*, §§ 222-25.

§ 206. The statute of limitations commences to run in favor of stockholders on a liability created by statute when the liability is incurred. *Terry v. Anderson*, §§ 226-29.

§ 207. Unless otherwise distinctly declared by the statute prescribing fixed periods for the commencement of suits, the cause of action is not, ordinarily, deemed to have accrued against, nor limitation to commence running in favor of, the trustee of funds to invest until the trust is closed or until the trustee, with the knowledge of the *cestuis que trust*, disavows the trust or holds adversely to their claim. *Bacon v. Rives*, §§ 230-32.

[NOTES.— See §§ 233-291.]

(a) The cases of *Clark v. Iowa City*,* 20 Wall., 583, and *Koshkonong v. Burton*, 14 Otto, 668, were decided on the same principles, and are not materially different from the preceding case.

WILCOX v. PLUMMER.

(4 Peters, 172-188. 1830.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This suit was instituted in the circuit court of the United States, in North Carolina, to recover of the defendants the amount of a loss sustained by reason of the neglect or unskilful conduct of their testator, while acting in the character of an attorney at law. A promissory note was placed in his hands for collection by the plaintiffs. He instituted a suit in the state court thereon, against Banks, the drawer, on the 7th of February, 1820, but neglected to do so against Hawkins, the indorser. Banks proved insolvent; and then, to wit, on the 8th of February, 1821, he issued a writ against the indorser, but committed a fatal misnomer of the plaintiffs, upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against them. Before that time the action against the indorser was barred by limitation, to wit, on the 9th of November, 1822, and this suit was instituted on the 27th of January, 1825.

The form of the action is *assumpsit*; and the plea now to be considered is the act of limitation, which, in that state, creates a bar to that action in three years. The case is presented in a very anomalous form; but in order to subject it to any known class of rules, we must consider it as coming up upon opposite bills of exceptions, craving instructions, on which the court divided. This court can only certify an opinion on the points so raised; that part of the agreement stated in the record which relates to the rendering of judgment on the one side or on the other must have its operation in the court below.

There were two counts in the declaration; the one laying the breach in not suing at all, until the note became barred, thus treating as a mere nullity the suit in which the blunder was committed; and the other laying the breach in the commission of the blunder; but both placing the damages upon the barring of the note by the act of limitation.

§ 208. *Action against attorney for negligence; when statute begins to run.*

As this event happened on the 22d of November, 1822, this suit is in time if the statute commenced running only from the happening of the damage. But if it commenced running either when the suit was commenced against the drawer, or a reasonable time after, or at the time of Banks' insolvency, or at the time when the blunder was committed, in any one of those events the three years had run out. And thus the only question in the case is, whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite. And this we hardly feel at liberty to treat as an open question. It is not a case of consequential damages, in the technical acceptance of those terms, such as the case of *Gillon v. Bodington*, 1 Car. & P., 541, in which the digging near the plaintiff's foundation was the cause of the injury; for in that instance no right or contract was violated, and by possibility the act might have proved harmless, as it would have been had the wall never fallen. Nor is it analogous to the case of a nuisance; since the nuisance of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery.

The ground of action here is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted, is the question; for from that time the statute must run.

When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action.

This is fully illustrated by the case from Salkeld and Modern, in which a plaintiff, having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and of consequence could not have been compensated in making up the verdict.

The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz., 1 Croke, 53, this was one of the points ruled in the *Sheriffs of Norwich v. Bradshaw*. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battley v. Faulkner*, 3 B. & Ald., 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short v. McCarthy*, 3 B. & Ald., 626, which was *assumpsit* against an attorney for neglect of duty, the plea of the statute was sustained, though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger v. George*, 5 B. & C., 149. In both cases the court intimating that, if suppressed by fraud, it ought to be replied to the plea, if the party could avail himself of it. In *Howell v. Young*, 5 B. & C., 259, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury.

The opinion of this court will have to be certified in the language of the defendants' supposed bill of exceptions, to wit, "that on the first count in the declaration, the cause of the action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection, or at all events, after the failure to collect the money from the maker. And that on the second count his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs."

AMY v. DUBUQUE.

(8 Otto, 470-476. 1878.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The question of limitation presented for our consideration upon this writ of error depends for its solution upon the statutes of Iowa. "It is not to be questioned," said this court in *Hawkins et al. v. Barney's Lessee*, 5 Pet., 457, "that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights." *McElmoyle v. Cohen*, 13 Pet., 312 (JUDG., §§ 1126-30).

It is as little to be questioned that "the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals." *Leffingwell v. Warren*, 2 Black, 599; *Green v. Neal*, 6 Pet., 291 (§§ 142-44, *supra*); *Harpending v. Dutch Church*, 16 id., 455 (§§ 56-64, *supra*); *Davis v. Briggs*, 97 U. S., 628 (§§ 1010-13, *infra*).

Guided by these established rules, we proceed to the consideration of the question before us, in the light both of the statutes of Iowa and of the construction given to them by the highest court of that state.

Our first inquiry is as to the cause of action set out in the petition. The plaintiff in error seeks to recover the amount of sundry interest coupons annexed to bonds issued by the city of Dubuque in 1857, in payment of a subscription to the capital stock of a railroad company. The bonds are in the usual form of municipal securities, and were made payable on the 1st of January, 1877, at a bank in the city of New York, together with interest thereon at the rate of ten per cent. per annum, payable semi-annually on each first day of July and January, on the presentation and surrender of the coupons at such bank as they should respectively become due by the terms thereof. Each bond was secured by a pledge of the shares of stock received in exchange therefor, and the stock pledged was placed in the hands of authorized trustees, who were empowered and required, at the request of the holder of the bond, and when the city was in default in the payment of either principal or interest, or any part thereof, to sell it at public or private sale, in discharge of the unpaid principal or interest. The coupons sued on had not, at the institution of this action, been severed from the bonds to which they were annexed. Judgment is asked for the several instalments of interest, with interest on each instalment from the time it became due. The city contends that the action is barred by the Iowa statute of limitations. In that view the circuit judge concurred, and judgment was rendered for the city.

§ 209. *The statute of limitations of Iowa begins to run on the coupons of bonds from the date of their maturity, whether they are detached from the bonds or not.*

The code of Iowa declares that actions "founded on written contracts" may be brought within ten years "after their causes accrue, and not afterwards." Code of 1873, sec. 2529. Such had been the law of that state for many years prior to the adoption of the code of 1873. We find the same provision in the code of 1851. Code of 1851, sec. 1659. What actions are founded on written contracts, and when causes of action accrue, within the meaning of the Iowa code, may be gathered from decisions of the supreme court of that state. The earliest decision to which we are referred is *Bahr v. Arndt*, 9 Ia., 39. That was the case of a mortgage executed to secure a note payable ten years after date, with interest at the rate of ten per cent. per annum from date, payable annually. The court held that a foreclosure could be had before the maturity of the note for an instalment of interest due. In *Mann v. Cross*, 9 id., 327, which was a suit to foreclose a mortgage, given to secure a note bearing ten per cent. interest, payable annually, the court said: "Was he [the mortgagee] entitled to six per cent. interest upon the interest annually due? We think he was. The respondent was under a legal obligation to pay this interest at the end of the year; it was a sum of money then due, without a contract fixing the rate of interest upon it, and for which he might have

been sued. He was, therefore, bound to pay its legal value, which by our law, in the absence of a written agreement reserving more, is fixed at six cents on the hundred." *Hershey v. Hershey*, 18 id., 24, was the case of a written agreement to purchase an interest in mill property at a valuation by appraisers, and "to pay the principal sum of such purchase on or before five years from the date of the appraisement, and in the meantime to pay interest for the full sum at the rate of seven per cent. per annum, the interest to be paid semi-annually." It was held that an action at law could be maintained for any unpaid semi-annual instalment of interest. Said the court: "The payment of interest periodically is expressly stipulated for, and for a breach of this contract plaintiff may recover, just as clearly as for the non-payment of an instalment of principal. By their agreement the parties have made this interest, when it matures, not simply an incident of the debt, but *pro tanto* the debt itself. And plaintiff was not, therefore, bound to wait the expiration of the five years from the date of the award to recover for the semi-annual instalment of interest." The court said further: "The plaintiff sues at law for the interest precisely as if he had separate notes for the same, and as he might do in case of an ordinary bond." To the same general effect is *Preston v. Walker*, 26 id., 205. In the subsequent case of *Baker v. Johnson County*, 33 id., 151, the inquiry arose as to the time when limitation commenced to run upon a contract whereby Baker was employed to render services in behalf of the county in connection with its claim against the general government for swamp-land money and land scrip. The court held that Baker had a right of action from the date when his services were completed, and that his cause of action accrued at that date. *Callanan v. The County of Madison*, 45 id., 561, was an action to recover back taxes which had been improperly exacted. The defense of limitation being interposed, the court said that "the cause of action accrues at the very moment of payment of the taxes, if at that time the tax was erroneous or illegal. The right of the plaintiff and the liability of the county do not depend upon the future acts to be done or suffered by either; their relation as creditor and debtor is fixed by the illegality of the tax."

It seems from these authorities to be the settled law of Iowa: 1st. That where interest is, by contract, made payable at stated times, an action may be maintained therefor in advance of the maturity of the principal debt, and legal interest upon such interest recovered. 2d. That within the meaning of the Iowa statute of limitations the cause of action accrues when suit may be commenced for the breach of such contract. Both of these propositions are in line with the former decisions of this court. We have held in numerous cases not only that suit may be maintained upon unpaid coupons, in advance of the maturity of the principal debt and without producing the bonds, but that the holder of such coupons is entitled to recover interest thereon from their maturity. *Commissioners of Knox County v. Aspinwall*, 21 How., 539 (Bonds, §§ 1413-18); *Gelpcke v. City of Dubuque*, 1 Wall., 175 (Bonds, §§ 1367-70); *The City v. Lamson*, 9 id., 477 (Bonds, §§ 1730-34); *City of Lexington v. Butler*, 14 id., 282 (Bonds, §§ 1377-81); *Clark v. Iowa City*, 20 id., 583; *Town of Genoa v. Woodruff*, 92 U. S., 502. This court has also had occasion to consider the question as to when, upon principle, limitation commences to run. In *Wilcox v. Plummer*, 4 Pet., 172 (§ 208, *supra*), it was said: "The ground of action here is a contract to act diligently and skilfully, and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted is the question; for from

that time the statute must run." Angell, Limitations, sec. 42; 2 Saunders, Pl. and Evid., 309.

This action is, beyond question, founded upon written contracts. The coupons in suit matured more than ten years prior to its commencement. Upon the non-payment, at maturity, of each coupon the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. The premises conceded, as they must be, there is no escape from the conclusion stated.

§ 210. *Coupons are contracts of the same grade as the bonds to which they are attached.*

But it is insisted that this conclusion is in conflict with the former decisions of this court in *The City v. Lamson*, *supra*; *City of Lexington v. Butler*, *supra*; and *Clark v. Iowa City*, *supra*. In this counsel are mistaken. They misapprehend altogether the doctrines settled in those cases. The first arose under the Wisconsin statute of limitations, while the second involved the construction of a Kentucky statute. The decisions in those cases, as we declared in the third case, only established the doctrine that coupons were not mere simple contracts, but, under the local statutes of particular states, were to be regarded as specialties and separate contracts, like the bonds to which they are attached. After an examination of the preceding cases, we said that "it was not the intention of the court to decide that an action upon a coupon, detached from the bond and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself; much less to hold that the coupons remained a valid and subsisting cause of action not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute ran against the coupons was the longest or shortest period,—was it six or twenty years in the Wisconsin case, or was it five or fifteen years in the Kentucky case,—and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds, and the statute ran for that period as to them."

§ 211. *The right of action upon coupons is complete upon their non-payment at maturity, whether severed from the bond or not.*

The case of *Clark v. Iowa City* arose under the same statute of limitations which is invoked by the city of Dubuque for its protection in this case. It is cited by counsel for plaintiff in error in support of the proposition that limitation under the Iowa statute does not commence to run against a coupon until it is detached from the bond. There are some expressions in the opinion in that case which, standing alone, would seem to sustain that construction of the statute. But it is quite obvious from the whole opinion that the conclusion reached, upon the point necessary to be decided, did not rest upon the isolated fact that the coupons sued on had become severed from the bond. It did rest mainly upon the ground that the coupons sued on were specialties, separate written contracts, capable of supporting actions after their maturity, without reference to the maturity or ownership of the bonds. We distinctly held that all statutes of limitation begin to run when the right of action is complete. We said: "Every consideration, therefore, which gives efficacy to the statute of limitations, when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the

coupons after their maturity." Our answer to the specific question certified to us was, "that the statute of Iowa, which extends the same limitations to actions on all written contracts, sealed or unsealed, began to run against the coupons in suit from their respective maturities." So far, then, as that case bears upon the defense of the city, it is an express authority for the position that the limitation of ten years prescribed by the Iowa statute applies equally to bonds and their coupons. The only material respect in which this case differs from that is that the coupons in suit here have never been severed from the bonds, and are held by the owner of the latter, while in that case they were severed from bonds which had been previously paid off. But this difference cannot logically, or in view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupons was complete after their non-payment at maturity, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years without suit, from the time "their causes accrue;" that is, from the time the right to sue for a breach attaches. We adhere, therefore, to our decision in *Clark v. Iowa City*, that the statute of limitations began to run, under the Iowa statute, from the time the coupons respectively matured.

Judgment affirmed.

ANDREAE v. REDFIELD.

(8 Otto, 225-239. 1878.)

APPEAL from U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Customs duties, illegally exacted, may be recovered back by an action in the circuit court against the collector for money had and received, provided the payment was made under protest, in writing, signed by the party, as required by the act of congress applicable to the case. 5 Stat., 727; 13 id., 214; *The Assessors v. Osborn*, 9 Wall., 567 (Courts, §§ 1575-80).

Circuit courts under existing laws have not jurisdiction of suits to recover back moneys illegally exacted for internal revenue duties, unless the parties are citizens of different states, or the suit is removed into the circuit court from a state court. *Hornthal v. The Collector*, 9 id., 560.

None of the acts of congress, however, which exclude the jurisdiction of the circuit courts in these cases have any application where the suit is brought to recover back duties of customs illegally exacted if the payment was made under protest, as required by law. R. S., secs. 2931-3011.

Goods to a large amount were imported by the complainants, or by the several firms to which they belong; and they allege that the goods were subject to duty in proportion to the actual market value of the articles at the principal market of the country from which the same were imported, and that the collector, in order to ascertain the dutiable value of the merchandise, erroneously added to the said market value, or compelled the owner or consignee to add to the same, certain charges for the expenses of transportation from the

market where purchased to the place of shipment, together with two and a half per cent. commissions on such charges, and that he unlawfully computed the duty upon such erroneous and excessive valuation.

Importations of the kind, it is admitted, were subject to duty; but the complaint is that the duties as ascertained and liquidated were excessive, and that the complainants, in order to obtain possession of the goods, were obliged to pay the excessive amount charged; and they aver that they paid the same under protest, as provided by law. Sixty importations of the kind were made by the complainants, and seven years after the respondent went out of office they commenced suits to recover back the excess of duty illegally exacted in each of the sixty cases.

Service was made, and the respondent, in November, 1866, appeared and pleaded, among other defenses, the statute of limitations. Four replications were filed by the plaintiffs to the plea, to which demurrers were interposed by the defendant. Hearing was had, and the court sustained the demurrers to the third and fourth replications, and overruled the demurrers to the first and second. Issuable matters being set forth in the first and second replications, the plaintiffs filed rejoinders to those tendering issues, and in April, 1872, the issues were joined, and the cases have since been ready for trial. Continuances from term to term followed, and on the 11th of March, 1874, the present bill of complaint was filed by the plaintiffs in those several actions, all joining as complainants. All of the actions at law are still pending, and the only relief sought by the bill of complaint is an injunction to restrain the respondent "from prosecuting or maintaining upon the trial of any of the said sixty actions his plea of the statute of limitations, and from claiming and insisting in said trials" that the said actions or any of them are barred by the said statute of limitations.

Two objections are taken to the action of the collector: 1. That in ascertaining the dutiable value of the goods he improperly included the expense of transportation from the principal market of the country where purchased, to the place of shipment. 2. That he also erroneously included in such dutiable value a higher rate of commissions than is authorized by the revenue law.

Various matters are set forth in the bill of complaint as causes that entitle the complainants to the relief sought, which, in brief, may be described as follows: 1. That the complainants respectively have a just and legal claim to recover back the excess of duties which they paid under protest, and which were illegally exacted by the respondent. 2. That the statute of limitations at the time hereafter mentioned was about to take effect as a bar to the causes of action embraced in the said several suits. 3. That an officer in the custom-house where the goods were entered stated to the attorney of the importers that, by the rules and practice of the treasury department, the presentation of their respective claims to the auditor or to the refund clerk of the custom-house would prevent the running of the statute of limitations, and that the statute, if the claims were so presented, could not and would not be interposed as a defense, in case suits should subsequently be commenced to recover back such excess of duties. 4. That the respondent, as such collector, though he disclaimed any control in the matter, declared his confidence in the knowledge and experience of the officer who made that statement, and expressed to the said attorney his concurrence in the said opinion and statement. 5. That the complainants did present their respective claims to the auditor or refund clerk of the custom-house, as suggested, and that relying upon the prior action of

the secretary of the treasury in recognizing claims of a like nature, and upon the said statements and opinion of the officer of the custom-house, and the concurrence of the respondent therein, they respectively refrained from bringing actions to recover back such excess of duties so illegally exacted until the statute of limitations had run against all of their claims.

Preliminary to those allegations in the bill of complaint, it is also alleged that actions of a like kind to recover back such illegal exactions were previously commenced and prosecuted in two other districts, in which it was decided and adjudged that the charges for transportation and commissions on the same were illegal, and that the secretary of the treasury paid back the excess in those cases; and they also allege that orders were issued by that officer to the respondent and to his successor in office to prepare statements showing the amount of such excess, and to transmit the same to the department for consideration.

Due appearance was entered by the respondent, and he demurred to the bill of complaint. Certain interlocutory proceedings followed, which it is not important to notice in this investigation. Suffice it to say, in this connection, that the parties having been fully heard, the court entered a decree dismissing the bill of complaint, and the complainants appealed to this court. Since the appeal was entered here, the complainants assign for error the ruling of the circuit judge sustaining the demurrers of the respondent, and the decree of the court dismissing the bill of complaint.

Discussion to show that the several importers had a good cause of action, irrespective of the statute of limitations, is unnecessary, as that proposition is admitted by the demurrer; but it is equally clear that that admission, without more, will not avail the complainants in the present controversy, as it is obvious that they had a plain, adequate and complete remedy at law. Excessive customs duties illegally exacted may be recovered back in an action of *assumpsit* for money had and received, if due protest in writing is made by the party aggrieved, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the required payment. 5 Stat., 727.

Suppose that is so, still it is insisted by the complainants that they were wrongfully induced by the public authorities to delay the enforcement of their legal claims until their respective causes of action became barred by the statute of limitations; and attempt is made in argument to support that proposition by each and every of the grounds specifically set forth in the bill of complaint.

1. That the circuit courts in two instances decided and adjudged that the exaction of such duties was illegal, and that the secretary of the treasury repaid the same in accordance with the judgments.

2. That the secretary of the treasury submitted to the rule established in those cases, and was willing to apply it to the claims of the importers in these cases, when the claims were duly adjusted and presented in the manner required by the regulations of the department.

3. That the secretary of the treasury issued an order to the collector to ascertain the amount of such excess of duty, and to transmit the account, when prepared, to the department, together with a statement of the excess charged for commissions on the same importations.

4. Orders, it is also alleged, were adopted by the treasury department which show that the importers in such cases were entitled to the excess of duties illegally exacted as soon as the importers could furnish to the auditor or refund

clerk detailed statements of the previous importations, and the names of the vessels in which they were made, and the dates of their arrival in the port, such statements being required in order to enable the auditor of the custom-house or refund clerk to prepare certified copies of the same to be forwarded to the department, pursuant to the instructions of the secretary of the treasury.

Labor, care and attention were required to comply with that requirement; and the complainants allege that whatever devolved upon them in the matter was seasonably accomplished, but they admit that the certified statements to be forwarded to the department were not completed by the auditor or refund clerk when the respondent, as collector, went out of office.

Culpable remissness of duty is not charged upon the auditor or refund clerk, during the period while the collector who liquidated the duties remained in office as collector of the port. Nothing of the kind is alleged, but the charge is that his successor refused to allow the process of adjusting the claims of the complainants to be continued; that they complained of the delay and the refusal of the successor, and that the secretary of the treasury issued an order to the new collector, requesting that the instructions upon the subject given to his predecessor should be complied with at his earliest convenience; and it is alleged that such an order was given, as shown by the exhibit annexed to the bill of complaint, but it is admitted that the claims of the complainants were never reported in pursuance of the orders of the secretary of the treasury.

Considerable progress was made in preparing the necessary statements, and the complainants allege that it was during that period that their attorney suggested to the auditor of the custom-house that the claims would soon be barred by the statute of limitations, and made inquiry of him whether it would not be necessary to commence suits to prevent the bar from attaching, to which the auditor replied that instructions having been given by the department to refund the money, it was not the fault of the department that it had not been done; that all the complainants had to do to prevent the statute of limitations from running was to present their claims to the refund clerk for adjustment, as required by the rules and practice of the treasury department.

Subsequent conversations were also had by their attorney with the auditor of the custom-house, of like import and to the same effect; and the complainants also allege that the respondent, in a conversation with their attorney, remarked that the auditor was very familiar with the practice of the department, and that he, the attorney, could rely upon the auditor's statements, and added that he could see no necessity for commencing suits in the cases, as if the complainants would present their claims for adjustment the statute would cease to run from that time, and would not be interposed as a defense to the claims.

Many other excusatory allegations of a corresponding import are set forth in the bill of complaint; and the complainants allege that, relying upon those matters, and for the purpose of avoiding a multiplicity of suits, they refrained from bringing the actions, in full faith and confidence that the statute of limitations would not be set up as a defense to any actions which should thereafter be brought to enforce their claims.

Afterwards the same attorney, as the complainants allege, sought an interview with the secretary of the treasury, and brought to his notice the representations of the auditor of the custom-house and the respondent in respect to the statute of limitations, and inquired of him whether the complainants could rely on the representations and statements that suits need not be commenced to prevent the statute of limitations from running, provided they presented

their claims for adjustment in proper time. Before replying to the inquiry, the allegation is that the secretary of the treasury consulted with the clerk in charge, and the complainants allege that his reply was that such had been the practice for many years, and that latterly it had become even more liberal, referring to the fact that where a favorable decision was obtained in one case the same rule was applied in others of the same class.

Claims of the kind in great numbers were in the meantime, as the complainants allege, adjusted and paid to the claimants, and they also allege that on the 10th of May, 1864, sixty of their claims remained unadjusted and unpaid, for which they brought the several suits described in the bill of complaint. Process being issued and served, the respondent appeared and pleaded *non assumpsit*, payment, and the statute of limitations. Replications, as before explained, were filed, and demurrers interposed and disposed of in the manner heretofore stated, leaving issues for the jury under the first two of the replications.

Viewed in the light of these several suggestions, it is clear that the several claims of the complainants were never prepared and presented, as required, to the secretary of the treasury for adjustment and allowance; but the complainants allege that they were induced to delay such preparation and presentation by the recited official representations and others of like import, and they pray for an injunction restraining the respondent from setting up the bar of the statute of limitations in defense of the several actions to recover back the moneys which the respondent, as collector, illegally exacted of them as such importers.

§ 212. *Preventive remedies for illegal exactions of customs duties not permitted.*

Importers in such cases may make payment under protest and bring an action of *assumpsit* for money had and received against the collector to recover back whatever amount was illegally exacted. Preventive remedies are not authorized by the acts of congress, nor have they ever been since the revenue system of the United States was organized. Instead of that, the act of congress now in force provides as follows: "And no suit for the purpose of restraining the assessment and collection of a tax shall be maintained in any court." 14 Stat., 475.

Appropriate remedy is given in such cases by action against the collector, and provision is made, in case the importer recovers, that no execution shall issue against the collector if the court certifies that he had probable cause for his action, or in case it appears that he acted under directions of the secretary of the treasury, or other proper officer of the government, the regulation being that the amount recovered shall in that event be paid out of appropriations made for the purpose. 12 id., 741; R. S., sec. 989.

Merchants importing goods find ample remedy under the provisions mentioned for illegal exactions made by collectors, and the better opinion is that it is the only judicial remedy authorized by congress for the redress of such grievances. Beyond all doubt, the remedy the importing merchant has in such a controversy is against the collector; and in case of recovery he is entitled to an execution against the defendant in the action, unless the court shall certify that the collector had probable cause for his action, or it appears that he acted under directions from the proper official source. Directions of the kind are doubtless frequently given; and in such cases it may well be contended that the suit is in the nature of a suit against the United States, as the provision is

that "the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriations from the treasury." 12 Stat., 741.

Cases of that kind present little or no difficulty of decision; but it is equally true that cases arise where no such instructions were given, and in such cases it follows that the importer, if he prevails in the suit, is entitled to an execution against the defendant which will bind his goods and estate, unless the court where the judgment is rendered deems it proper to give the collector a certificate that he had probable cause for his action in exacting the excessive duties. Certificates of the kind are never given until the litigation is closed, and, of course, it cannot be known whether it will be given or refused pending the litigation.

Where the collector acts under antecedent directions from the proper source, it is clear that the suit is in the nature of a suit against the United States, and it may be that the suit, if the certificate of probable cause is finally given, may be regarded in the same light; but more difficulty would attend the solution of the question in a case where neither of those conditions occur, especially if it appears that the suit was not commenced until after the collector went out of office. Actions of the kind must be commenced against the collector who made the illegal exaction, and no one pretends that such an action can proceed against the successor after the incumbent goes out of office.

Importers, in case they prevail, are in any view entitled to be paid the amount which they recover; nor is it important in this case to determine whether the pending actions are in the nature of suits against the United States, or merely suits against the collector, as in either view the result must be the same. Arguments to show that the actions in form are actions against the present respondent is unnecessary, as that is conceded, but there is much reason to suppose that the collector acted under official orders.

§ 213. *Effect of statements of government officials in causes of action against the collector of customs.*

Concede that the United States is the real party, still the court is of the opinion that there is nothing in the remarks attributed to the auditor of the custom-house or to the refund clerk or to the secretary of the treasury which can be held to preclude the respondent from pleading any proper plea to the actions which he may think necessary in making his defense. When the suits against the collector were commenced to recover back the money which the complainants allege he exacted from them illegally he was a private citizen, and nothing is shown in pleading to justify the conclusion that the secretary of the treasury or the customs officers made any remarks which can create any liability as against the respondent which he did not incur. Nor is there anything in the remarks of that officer, made to the attorney of the complainants, which will support the theory that he ever intended to deprive the respondent, as the defendant in these actions, of the right to plead any plea he, the respondent, might see fit in defense of the claims therein prosecuted.

Congress undoubtedly might authorize actions of the kind to be brought directly against the United States; but all must concede that such a power has never been exercised and is not conferred, and in the absence of such legislation the court is of the opinion that such actions may in certain aspects be treated as actions against the collector, unless it appears that he acted under the directions of the proper official authority, or that a case is made where no execution can issue against the collector.

Even suppose it were otherwise, still it is clear that none of the remarks at-

tributed to the secretary of the treasury or to the officers of the customs can have any effect to estop the respondent from pleading any matter in defense of the actions which he may think necessary to protect his rights. Rightly interpreted, all that the respondent said to the attorney of the complainants had reference to the future action of the secretary of the treasury; that is, he expressed the opinion that the complainants could rely upon the statements of the auditor as correct, that according to the practice of the department the statute of limitations would cease to run when their claims were properly prepared and presented for adjudication and allowance.

Taken in the most favorable view for the complainants, it is clear that it is impossible to regard those remarks as a contract or promise made by either party. There was no promise to forbear instituting the suits, nor was there any promise, if forbearance was accorded, that the statute should cease to run. Every pretense of that sort is negatived by the language employed, which even fails to show that any negotiation took place between the parties looking to any such arrangement, contract or promise. When they separated, each party was as free to pursue his own course as when the interview commenced. Complainants might have brought suits the same day; and if they had, the respondent would have been at liberty to make any defense in his power, irrespective of anything which had transpired at the interview.

Nor is there anything shown in the remarks attributed to the secretary of the treasury which can be held to support the theory of the complainants that he entered into any contract with their attorney, or ever made any promise that the statute of limitations should cease to run. All he did was to answer the questions propounded as to the practice of the department; but he gave no assurance that any indulgence would be granted to the complainants, unless the claims were duly prepared and presented for adjustment in proper time.

§ 214. *In cases of fraud, the right of action accrues and the statute begins to run when the fraud is consummated.*

Examined in the light of these suggestions, as the case should be, it is obvious that the complainants have no just cause of complaint, as they have not in fact been deceived or misled. Grant that, and still the complainants contend that it had the effect to conceal from them the necessity of instituting suits to prevent their claims from being barred by the lapse of time, and they contend that the same rule should be applied in the case as when the defendant fraudulently conceals from the plaintiff his cause of action; and decided cases are referred to where it is held that in such controversies the statute does not begin to run until the fraud is discovered.

§ 215. *Federal courts follow decisions of state courts in construing statutes of limitation.*

Except where the constitution, treaties or statutes of the United States otherwise require, the judiciary act provides that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat., 92; R. S., sec. 721. Repeated decisions of this court decide that the court is bound to conform to the decisions of the state courts in the construction of their statutes of limitation. *Green v. Neal*, 6 Pet., 291 (§§ 142-44, *supra*); *Harpending v. Dutch Church*, 16 id., 455 (§§ 57-64, *supra*); *Porterfield v. Clark*, 2 How., 125.

State statutes in many cases provide that, where the action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery;

but the courts of New York, as well as several other states, have always held that the concealment of the cause of action *ex contractu* does not interrupt or delay the running of the statute as a bar to the action. *Troup v. Smith*, 20 Johns. (N. Y.), 44.

Assumpsit was brought in that case to recover damages, for that the testator, in his life-time, undertook to survey a certain township of land, and to divide the same into convenient lots, to enable the plaintiff to sell the same to the best advantage; and the charge was, that he performed the work so unfaithfully and unskillfully that it caused great damage to his employer, to which was added the money counts. Due appearance was entered by the executors of the deceased, and they pleaded *non assumpsit* and the statute of limitations. Issue was joined upon the first plea, and to the second the plaintiff replied that the cause of action was not discovered until within less than six years before the action was commenced. More than six years had elapsed after the fraud was committed, but it was not discovered until two or more years later; and the defendant demurred to the replication, insisting that the statute commenced to run from the time the fraud was committed, and the question of the sufficiency of the replication was argued by eminent counsel.

Plaintiff's counsel, in endeavoring to support the replication, contended that the cause of action did not accrue until the plaintiff discovered the fraud in making the survey; and in responding to that proposition, Spencer, C. J., who delivered the opinion of the court, remarked that the inquiry is, when did the plaintiff's cause of action accrue? and he immediately answered the inquiry as follows: "Most certainly, when the fraud was consummated;" which was, as the whole court held, when the testator had completed the survey, as far as it was completed, and made the return of his field-notes and received his compensation, adding, that the injury, as far as he was concerned, was then done, and that he then became liable to an action for the fraudulent and imperfect manner of executing the duties he had assumed.

Speaking to the same point, the learned chief justice also remarked, that the fact that the plaintiff did not discover the imposition practiced is a matter entirely distinct from the existence of the fraud and imposition. If, then, the plaintiff's cause of action accrued from the consummation of the fraud by the testator, and not at the time the plaintiff discovered it, the statute interposes as a protection, unless the action is commenced within six years next after the wrong was perpetrated.

Some countenance, he admits, is given to the opposite theory by certain decided cases, to which he refers, and then he proceeds to say: "We cannot, however, yield the convictions of our own minds to decisions evidently borrowed from the courts of equity, and which have never been sanctioned by the courts of law in the country from which our jurisprudence is derived." He admits that the rule is otherwise in courts of equity; but the court decided that courts of law are expressly bound by the statute, giving as a reason for the conclusion, that it relates to specified actions, and that it declares that such actions shall be commenced and sued within six years next after such actions accrued, and not after. *Maxwell, Statutes*, 6; *Imperial Gas Light and Coke Co. v. London Gas Light Co.*, 10 Exch., 39. Thus not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period.

It is no answer to a plea of the statute of limitations, says Nelson, C. J., that the cause of action was fraudulently concealed by the defendant until

after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue. *Allen v. Mille*, 17 Wend. (N. Y.), 204; *Leonard v. Pitney*, 5 id., 30. Courts of equity, says Bronson, may grant relief against acts and contracts executed under mistake or in ignorance of material facts; but it is otherwise where a party wishes to avoid his act or deed on the ground that he was ignorant of the law. *Ignorantia juris non excusat*. *Champlin v. Laytin*, 18 id., 407; *Storrs v. Barker*, 6 Johns. (N. Y.) Ch., 166.

It is not a sufficient answer to the statute of limitations, says Phelps, in an action on the case for deceit, that the plaintiff was ignorant of his cause of action until within six years, although that ignorance was occasioned by the nature of the deceit or the manner in which the fraud was perpetrated. *Smith v. Bishop*, 9 Vt., 110; *Fee v. Fee*, 10 Ohio, 469; *Clark v. Reeder*, 1 Spears (S. C.), 407.

Without more, it must be conceded that these authorities are sufficient to show what the established rule in the states mentioned is, where the suit is an action at law, and that the fraudulent concealment by the defendant of the plaintiff's cause of action is not a good answer to the plea of the statute of limitations. Other states adopt the opposite rule, and their courts hold that the rule at law is the same in equity. *Hovender v. Annesly*, 2 Sch. & Lef., 606; *Coster v. Murray*, 5 Johns. (N. Y.) Ch., 522; *Michoud v. Girod*, 4 How., 503 (Est. of Dec., §§ 381-86); *Hallet v. Collins*, 10 id., 187 (Eq., §§ 144-48); *Sherwood v. Sutton*, 5 Mass., 149; *Jones v. Conway*, 4 Yeates (Pa.), 109; *McDowell v. Young*, 12 Serg. & R. (Pa.), 128; Angell, Limitations (6th ed.), secs. 189, 190.

But it is not necessary to rest the case entirely upon the state rule of decision, as it is clear that the matters alleged in the bill of complaint are not sufficient to support any such theory, nor is that the true theory of the claim made by the complainants. On the contrary, they allege that they had a legal and just claim to recover back certain import duties illegally exacted by the respondent; and the necessary implication from the allegation is that they knew the legality of the claims as well when they filed their protests as when, seven years later, they instituted the pending actions against the respondent.

Fraudulent concealment of the cause of action is not alleged, nor is it the *gravamen* of the complaint. No such charge is made; but the complaint is that they were induced by the aforesaid representation to refrain from bringing their actions until the bar of the statute of limitations had attached, which, in the judgment of the court, the matters set forth in the bill of complaint are not sufficient to show.

Give the allegations the broadest signification the language employed will justify, and it is clear that the conversations attributed to the secretary of the treasury and the officers of the custom-house do not amount to a contract or promise that the statute of limitations should cease to run in any contingency, whether the complainants did or did not cause their claims to be prepared and presented to the treasury department for adjustment and allowance.

They never did prepare and present their claims to the secretary of the treasury for allowance, as required by the alleged rules of the department, nor do the conversations alleged amount to a promise that the statute should cease to run even if they had complied with the supposed rules and practice of the department.

§ 216. *What promises will affect the running of the statute of limitations.*

Conversations of the kind cannot benefit the complainants, for several reasons: 1. Because they do not amount to a promise that the statute of limitations should cease to run; and if they did, they cannot avail the complainants as a new promise, because they are not in writing. 2. They do not amount to a contract to that effect; and if they do, they are without consideration. 3. They cannot have the effect to estop the respondent from pleading the bar of the statute, because both parties were equally well informed of all the facts. *Shapley v. Abbott*, 42 N. Y., 443; *Packard v. Sears*, 6 Ad. & Ell., 474; *Freeman v. Clark*, 2 Exch., 654; *Foster v. Dawber*, 6 id., 834; *Edwards v. Chapman*, 1 Mees. & W., 231; *Swain v. Seamens*, 9 Wall., 274 (CONTRACTS, §§ 1742-46); *S. C.*, 12 Blatch., 419. Tested by these considerations, it follows that there is no error in the record.

Decree affirmed.

Dissenting opinion by MR. JUSTICE MILLER, FIELD, J., concurring.

I dissent from the judgment in this case, because I believe that the acts and promises of the officers of the government alleged in the bill are such as to work an estoppel in equity to the plea of the statute of limitations in this case; and that the facts establishing this estoppel are too complex, and their relation to the defendant such that the issue cannot be well tried on a replication to the plea.

MERCHANTS' NATIONAL BANK OF BALTIMORE v. FIRST NATIONAL BANK OF BALTIMORE.

(Circuit Court for Maryland: 4 Hughes, 9-12; 8 Federal Reporter, 66-69. 1890.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—On the 16th of March, 1867, the treasurer of the United States made his draft on the First National Bank of Baltimore, a government depository, for \$1,609.55, payable to the order of William Orndorff. This check, apparently indorsed by Orndorff, the payee, and one Hargert, was forwarded by the Shenandoah Valley National Bank, with its own indorsement, to the Merchants' National Bank of Baltimore for collection. On the 22d of March it was indorsed by the Merchants' National, and, on presentation, paid by the First National in due course of business, both parties supposing the indorsement of the name of Orndorff was genuine. When the payment was made the amount was charged in account by the First National against the United States, and the draft forwarded with the next weekly statement to the treasury for credit, which was allowed without objection. Ten years afterwards, in 1877, the United States having become satisfied that the indorsement of Orndorff was forged, sued the First National Bank to recover the amount of this credit.

The Merchants' National Bank having been notified of the suit employed counsel to assist the First National in making a defense. Upon the trial the forgery was proven, and judgment rendered against the First National for the amount claimed. The First National paid the judgment, and then brought this suit against the Merchants' National to recover what was so paid, on the ground that the latter bank, by its indorsement of the draft and receipt of the money thereon, became responsible for the genuineness of Orndorff's signature.

§ 217. *When the statute of limitations begins to run against intermediate indorsers of a draft of which the payee's name was forged, and in favor of the drawee, who had paid the debt and charged the drawer.*

To this suit the Merchants' National pleaded the Maryland statute of limitations, which was three years, and the single question now presented is, whether this statute began to run when the draft was paid or when the judgment in favor of the United States against the First National was rendered. If the former, the suit is barred; if the latter, it is not. The drawee of a bill of exchange, by accepting and paying the bill, admits the genuineness of the signature of the drawer, and his own obligation to pay. An indorsee who demands and receives such a payment warrants his title to the bill from the prior parties under whom he claims. The legal effect of this warrant is that the payment is actually made to the order of the payee; and, so far as the title of the indorsee is concerned, will entitle the drawee to credit with the drawer for the amount drawn for. The undertaking is not as to the genuineness of the bill itself, but the title of the holder.

In this case the First National got credit at the treasury of the United States for the amount of the draft. It was thus put in actual possession of what the Merchants' National guaranteed it would be entitled to. The exchange of the funds of the United States in the hands of the depository for the bill thus became consummated, and no right of action on the warranty accrued until, at least, the United States elected to insist on the defect of title and cancel the credit.

The case of *Cowper v. Godmond*, 9 Bing., 788; 23 E. C. L., 452, is in principle much like this. There the question was whether a plea of the statute of limitations was a bar to an action for money had and received to recover the consideration money of a void annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as an existing annuity within that period. "That question," said the court, "depends upon another: at what time did the cause of action arise? The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of the annuity. The cause of action was not complete until the last step was taken." In the present case, also, the warranty contemplated two things — *First*, the giving of the credit by the United States; and, *second*, its continuance. As the first requirement of this undertaking was complied with, no right of action could arise until the second was broken. That certainly did not occur until the United States elected to take back the credit it had given.

It is true that in *Cowper v. Godmond* the election to disaffirm was with the party to whom the payment was originally made, but this does not affect the principle on which the right to recover rests. The object is to get back a consideration which has failed, and in such cases it is evident there can be no cause of action until the failure is complete. In *Cowper v. Godmond* the payment was for the annuity, and the failure did not occur until the grantor of the annuity disaffirmed his grant. Here the consideration was paid to get a credit with the United States, and the failure was not complete until the credit which had once been given was withdrawn.

This disposes of the case, as it is conceded the action was begun within three years after the United States gave notice of its election to withdraw the credit. The liability of the First National to account for the amount erroneously

credited was established by the judgment in favor of the United States, and, as the Merchants' National was notified of the pendency of that suit and took part in the defense, it must abide by the result. The judgment of the district court is affirmed.

KIBBE v. DITTO.

(8 Otto, 674-680. 1876.)

ERROR to U. S. Circuit Court, Northern District of Indiana.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—The defendants in this action of ejectment, which was commenced March 20, 1872, for a quarter section of land in Mercer county, Illinois, pleaded not guilty. A verdict and a judgment were rendered in their favor. The plaintiff sued out this writ of error.

William M. O'Hara, the owner in fee of the land, died intestate in the summer of 1821, leaving a widow, who outlived him less than a year, and four children, three of whom died intestate. Helen, their surviving sister, inherited their respective interests. She intermarried September 23, 1840, with Abram D. Harrel, who died December 16, 1871. Said Abram and Helen, by deed executed May 2, 1868, conveyed the land to the plaintiff, who thus showed a clear *prima facie* right to recover.

By a stipulation of the parties, entered of record in the court below, it is admitted that the land was vacant and unoccupied prior to December, 1857, and that ever since that date the defendants and their grantors have been in the possession of it under color of title, and paid all the taxes, so as to bring them within the limitation of 1839; that said possession has been by actual residence on the land, if title deducible of record is produced to accompany said possession, so as to make the limitation under the act of 1835. The defendants, to show color of title, put in evidence a deed for the land executed to them June 12, 1857, by Harding and Matthews.

§ 218. *The statute of limitations in Illinois as to estates of tenants by the curtesy initiate.*

Were Abram D. Harrel living, there can be no question that the facts set forth in the stipulation would be an absolute bar to a recovery. The supreme court of Illinois ruled that an estate held by the husband *jure uxoris* was a freehold, subject to the same incidents as that by the curtesy initiate, and governed in the same manner and to the same extent by the statute of limitations. *Kibbie v. Williams*, 48 Ill., 30. The earlier case of *Shortal v. Hinckley*, 31 id., 219, decides that a tenant by the curtesy initiate has a vested legal estate distinct from that of his wife, and that, if his right as such tenant be barred by the statute of limitations, ejectment by the grantees of himself and wife could not in his life-time be maintained. We are informed by the learned counsel for the plaintiff that the court below held that a former suit, brought there for the demanded premises when Mr. Harrel was living, would not lie.

§ 219. — *act of 1839.*

As the wife's right of possession did not accrue until after the determination of the estate of her husband, it was not tolled until the conditions, prescribed as a bar to her recovery, had occurred after his death. Under the statute of 1839 (Acts of Illinois, 1838-39, 266), a person having such a continuous possession under color of title, as is here admitted, and paying all taxes upon the land, shall be held to be the legal owner of it to the extent and ac-

cording to the tenor of his paper title; but that provision does not extend to a *feme covert*, if within three years after the termination of her disability she shall commence an action for the recovery of the land. Conceding to the grantee of husband and wife the same period after the determination of the coverture for bringing suit as was accorded to her, it is evident, in view of these rulings, that the lapse of time would not in this case defeat a recovery.

§ 220. *The law of Illinois protecting married women in their separate property.*

Such was the acknowledged limitation before the passage of the act of the general assembly of Illinois, entitled "An act to protect married woman in their separate property." Laws of 1861, 143. It provides "that all property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

These provisions were considered in *Emerson v. Clayton*, 32 Ill., 493. A married woman, in her own name and without joining her husband, brought replevin for certain chattels which she claimed as her own property. The defendant pleaded in abatement the coverture of the plaintiff at the time of the commencement of the suit. She replied that the chattels sued for were, during the coverture, acquired in good faith from persons other than her husband, with her own money and in her own right, and as such remained her separate property under her sole control, by virtue of the act of February 21, 1861. The judgment below, sustaining a demurrer to the replication, was reversed, with instructions to overrule the demurrer and give the defendant leave to take issue, should he desire to do so. Mr. Justice Breese, in delivering the opinion of the supreme court, remarks that a *feme covert* could not sue alone for her own property, or for the recovery of any of her rights at common law, as it vested her personal estate in her husband, and gave him absolute dominion over it; but that by the act she must alone sue for an invasion of the rights which it conferred, and must "be considered a *feme sole* in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture in good faith from any person not her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof." "The right of 'sole control' over the separate property of the wife by her necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right."

That case involved merely the ownership of personal chattels. The act makes no distinction whatever as to the species of property, and it would seem to be a necessary inference, from the reasoning of the learned judge, that a married woman has a complete and absolute right to sue in her own name to recover her lands in the wrongful possession of another.

The decision is silent as to the property acquired prior to 1861 by a woman then married; but in *Rose v. Sanderson*, 38 id., 247, and *Cole v. Van Riper*, 44 id., 347, the statute was construed as not applying to an estate in the lands of

the wife which was vested in the husband at the date of its passage. *Noble v. McFarland*, 51 id., 226, recognizes the same doctrine, and affirms that, in regard to such lands, the time within which the wife must commence her action after the removal of her disability does not begin to run until after the death of her husband. The same court held, in *Beach v. Miller*, id., 206, that where land was conveyed to the wife after the passage of the act, the husband's right to the curtesy was contingent, and that she could sue in her own name, when her rights thereto were affected; and in *Morrison v. Norman*, 47 id., 477, that the act did not so far remove the disabilities of coverture as to take married women out of the saving clause of the statute of limitations.

The effect of that act was recently considered by that court in a case presenting the following facts: Amos Haskins purchased a tract of land on the 27th day of October, 1849, of one Hall, for \$140, payable as follows: \$50 in one year, \$50 in two years, and \$40 in three years from the date of the purchase, for which he gave his promissory notes. He received a bond from Hall, covenanting, on the payment of them, to convey the property, and entered into possession of it. His son obtained \$35 or \$40 for one month of one Walrod, to whom he, in the name of said Amos, assigned the bond as security. This, with other money, was used to pay the first note and the interest on the remaining ones. Amos Haskins died in November, 1850. Walrod, not having been paid the amount loaned, presented, as assignee, the bond to Hall, from whom, on the 19th of that month, on making the deferred payments, he received a deed, which he put on record the day of its date, entered upon the land, made improvements and paid the taxes thereon.

A bill was filed against Walrod by the heirs-at-law of Amos Haskins on the 20th of January, 1869, to obtain their rights in the premises. The court said that the bar to a recovery of the possession of the land by an action at law was complete twelve years before the commencement of the suit, and that a court of equity, following the analogies of the law, should refuse the relief sought.

At the time Walrod went into possession of the land, three of the complainants were under the disability of coverture, and continued to be so when the bill was filed. It was insisted that as to them the statute did not run, and that no laches could be imputed. The court declared that by the provisions of the act in question the wife had the entire and sole control over her real and personal property, and that should her lands be occupied adversely she could bring ejectment,—use her own money to pay taxes, and thus prevent an occupant from holding possession and paying taxes until possession and payment would ripen into a bar to a recovery. "It is true," says the court, "that the act of 1861 does not purport to repeal the saving clause in the statute of limitations; but it is manifest that a reasonable construction of the language used, in connection with the scope, purpose and object of the statute, produces this result." "While the saving clause in the statute of limitations is not mentioned in the act of 1861, yet the powers conferred by the latter act so completely annihilate the existence of every reason which led to the passage of the former act, protecting a married woman from the running of the statute of limitations, that it would be absurd to hold that the two acts could stand together."

Emerson v. Clayton was cited and approved, and any expressions in *Noble v. McFarland* and other cases which conflict with the opinion were modified by the construction it gave the act.

§ 221. *In Illinois, under the act of 1861, the right of entry in a woman married before its passage accrues, and the statute of limitations begins to run, when the husband's life estate is barred.*

It is therefore clear that a woman who marries after the passage of the act in question is not within the saving clause of the statute of limitations, as against a party in the adverse possession of lands whereof she was seized at the time of her marriage, or which she subsequently acquires in the mode and manner mentioned in the act. As to the lands of which a woman, married at the date of the act, was previously seized, the limitation begins to run against her after the lapse of time barred the husband's right to recover them. The court uses this language: "When, therefore, the life estate which the husband had acquired by virtue of the marriage was terminated by operation of the statute of limitations, and the act of 1861 removed the disability of coverture of the complainants, they were then bound to bring their action within seven years, or their right or title would be barred. This the complainants failed to do, but permitted the defendant to remain upon the land undisturbed for more than seven years after the passage of the act of 1861. By non-action on their part they have lost their rights. They are not protected by the saving clause of the statute."

Castner et al. v. Walrod, in which these views are announced, was decided by the supreme court of Illinois, January 30, 1875. It was, on a petition for rehearing, reaffirmed in an elaborate opinion, filed January 31, 1877. Applying them to this case, it follows that the life estate of Abram D. Harrel was, in December, 1864, extinguished by the operation of the statute. His wife's right of entry was then absolutely vested, and, notwithstanding her coverture, was completely barred in 1871. The plaintiff claiming under her is, therefore, not entitled to maintain this suit.

It may be proper to add that the defendants put in evidence a paper writing, purporting to be a certified copy of a mortgage of the land in controversy by said William O'Hara and his wife, bearing date September, 1820, to John P. Cabanne; and the record of certain proceedings of the circuit court of Pike county, within the then limits of which the land was situate, showing that the mortgagee filed his bill of foreclosure April 23, 1822, the first day of the term, against Susan O'Hara, the widow and others, children and heirs of William M. O'Hara; an order of publication against defendants as non-residents; a decree of foreclosure; the appointment of a commissioner to make sale of the mortgaged premises; his report; the order confirming his doings in the premises; his acknowledgment of the deed to said John P. Cabanne, the purchaser, dated February 20, 1823; and the approval by the court of said deed. The defendants proved that Cabanne died in 1842, leaving children and grandchildren, a part of whom conveyed by deed, dated April 1, 1861, five undivided sevenths of the demanded premises to one Nettleton, who conveyed by way of quitclaim to the defendants.

Various questions arising upon this evidence,—the jurisdiction of the Pike circuit court, the validity of its decree, and the charge of the court below upon these and other matters involved,—have been argued at great length, and with marked ability. We do not consider it necessary to express any opinion upon them. Error in regard them, if any there be, would be of no avail to the plaintiff. The unreported case we have last cited establishes a rule of property in Illinois, which binds the courts of the United States, and presents an insuperable bar to his recovery.

Judgment affirmed.

PRATT v. PRATT.

(6 Otto, 704-712. 1877.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— This is an action of ejectment in which plaintiff in error was plaintiff below. On the trial he proved title in Isaac Speer in August, 1857, at which time he recovered a judgment against said Speer, under which the land in controversy was sold July 8, 1863, and a deed made to plaintiff founded on that sale February 24, 1865. There does not seem to be any question but that this vested in the plaintiff the legal title to the land some four years before the date of the commencement of this action, which was the 15th day of May, 1869.

Defendant relied solely on the statutes of limitation of seven years as found in the acts of the Illinois legislature of 1835 and 1839, page 674 of the Revised Statutes of 1874. We are not favored with any argument, oral or written, by the defendant in error, and have had to find out for ourselves on what he bases the defense of the court's ruling. It does not appear that the defense under the act of 1839 was established; but the court instructed the jury that if they believed certain facts were proved, which facts had reference to the seven years' possession under the act of 1835, their verdict should be for the defendant.

The law of 1835 provides that "No person who has or may have any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such lands, for non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall make any entry therein, except within seven years from the time of such possession being taken; but, when the possessor shall acquire such title after the time of taking such possession, the limitation shall begin to run from the time of acquiring title."

The defendant has, we think, brought himself within the language of this section by sufficient proof, so far as actual possession for seven years under a connected title in equity deducible of record from the United States could do so. And, on this proposition alone, the court told the jury to find for the defendant; but this instruction failed to give effect to other evidence before the jury, and undisputed, which, we think, had an important bearing on the case.

Upon an examination of the plaintiff's title, it will be seen that he had no right of entry until February 24, 1865. If the statute begun to run against him at that time, it had not run seven years, but only a little over four, when the suit was brought. Nor was there a right of entry, or right of action, in any person against defendant during his entire possession, until the marshal's deed was made to the plaintiff; for the reason that the equitable title under which the defendant held possession was derived from Speer. That is to say, after the judgment of the plaintiff against Speer was rendered, and a lien on the land thereby established in favor of the plaintiff, Isaac Speer, the judgment debtor, conveyed the land to Thomas Speer, and Thomas Speer conveyed to Samuel Roberts, and Samuel Roberts to Charles L. Roberts. The defendant

connected his possession with this title, by showing a contract of purchase from Charles L. Roberts. It is obvious, from this recital, that there was no one who could lawfully enter upon the land in the defendant's possession until the plaintiff's judgment lien had become perfected into a legal title by sale and conveyance.

Was it the purpose of this statute that the period of limitation should begin against one who had a lien of record on the land, but who was in no condition to make entry or bring suit, and when the person in privity with him, that could otherwise have made entry or brought suit, had parted with that right to the defendant?

§ 222. *The statute does not run in favor of a person in possession when there is no right of entry in any one who can oust him.*

The very first words of the section describe the person against whom the act is directed as a person having a right of entry. While no such strict construction can be maintained as that this right of entry must be in the same person during the entire seven years that possession is running in favor of the defendant, it seems reasonable that this period of seven years is not to begin when there was no right of entry in any one who could oust the defendant. The principle on which the statute of limitations is founded is the laches of the plaintiff in neglecting to assert his right. If, having the right of entry or the right of action, he fails to exercise it within the reasonable time fixed by the statute, he shall be forever barred. But this necessarily presupposes the existence of the right of entry or the right to bring suit. There can be no laches in failing to bring an action, when no right of action exists. There can be no neglect in asserting a right to the possession of property held by another, when that other is in the rightful possession.

§ 223. *Laches begins when he who has the better right of possession neglects to assert it.*

But the possession then rightful may, by the termination of the right under which it is held, or by the creation (in some legal mode) of a superior title, cease to be rightful. The right of possession may, in some of these modes, come into another. It is then that laches begins, if the person who has thus acquired the better right neglects to assert it. And it is then that the principle of the limitation of actions for recovery of the land first applies; and, if uninterrupted for the prescribed period, becomes a perfect bar to the recovery of the rightful owner. There is nothing in this statute which appears to conflict with this view. The possession must be continuous, and connected with color of title, legal or equitable. There must be a right of entry in some one else to be tolled by this seven years' possession, and the possession must be adverse to this right of entry.

It is said that, under the decision of the courts of Illinois, such possession as that of the defendant in the present case is adverse to all the world. There is no doubt but the supreme court of Illinois has said this, and that, in a general sense, it is true.

The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to everybody else. He admits no better right in any one. He is no man's tenant. The right by which he holds possession is superior to the right of all others. He asserts this, and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land,—a lien which does not interfere with his possession, which cannot disturb it, but

which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term, his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run.

This is a question of the construction of the statutes of Illinois; and the case of *Martin v. Judd*, 81 Ill., 488, is supposed to be in conflict with what we have here said. But we are unable to see anything in that case to justify such a conclusion. It is true that plaintiff in that case, as in this, asserted title under a judgment, a sale, and marshal's deed. The defendant asserted title under a judgment against the same party, and a sale and conveyance by the sheriff. The judgment under which plaintiff claimed was rendered July 14, 1854; sale, September 1, 1856; and marshal's deed, June 28, 1858. The judgment under which defendant claimed was rendered March 4, 1858; sale, November 7, 1859; sheriff's deed, October 14, 1862. The defendant relied on the seven years' statute of limitation. The suit, however, was commenced April 7, 1873; and the plaintiff had his marshal's deed June 28, 1858, which was fifteen years before he brought his action. The plaintiff, therefore, had the right of entry and a right of action for fifteen years before he brought suit. During all this time, or at least during the last seven years of it, the defendant had a possession under a title which was in every sense adverse to that of plaintiff.

§ 224. *Possession is not adverse to an execution purchaser until he has a title and right of action.*

In the case before us, plaintiff sued within five years after his lien became a title. Two of the seven years' possession on which defendant relies was at a time when plaintiff had no title, and consequently no right of action, and while none existed in those from whom he derives title. *Martin v. Judd* cannot therefore raise the only question there is in this case. The instruction of the court to the jury, and the comments in the opinion of the supreme court, show that the point in controversy in that case was whether the defendant had shown a continuous possession adverse to the plaintiff. That it was adverse, there can be no doubt; though it was insisted that it was otherwise, because held under a title derived from the same person that plaintiff's was. But it is very clear that, after the deed of the sheriff under the sale on the junior judgment, the possession held under that deed was a possession in conflict with and adverse to the title then held by plaintiff; namely, his deed under the senior judgment.

The opinion in *Martin v. Judd* refers to, and cites with approbation, the opinion of the court in *Cook v. Norton*, 48 Ill., 20. That case was twice before the supreme court of Illinois, and received (as is evident) a very careful consideration. It is reported in 43 Ill., 391, and in 48 id., 20. In that case Ryan was the common source of title. A judgment was recovered against him August 14, 1845; and a sale under execution on that judgment was made April 8, 1846. No deed was made under this sale until July, 1860, more than fourteen years after the sale, though the certificate of sale was filed in the recorder's office when it was made. Ryan conveyed the property, in a few months after the judgment was rendered, to persons under whom the defend-

ants held title and possession. The suit was commenced within the seven years after Cook obtained the sheriff's deed; but, as this was fourteen years after the sale, the question raised was when the statute began to run against Cook's title. A few extracts from the learned opinion of Mr. Justice Lawrence will show that the court is in accord with the views we have already expressed.

"Would any one deny," he asks, "that the purchaser in possession could protect himself, by proper proof, under the statute of limitations if more than seven years had elapsed from the time when the prior purchaser had received or might have received his deed? . . . The defendant has never acknowledged a lessor; nor any title paramount to his own. It is true the statute of limitations did not begin to run in his favor until the expiration of fifteen months from the sheriff's sale; because until then there was no outstanding title upon which suit could be brought. But upon that day the purchaser at the sale was at liberty to take out his deed, clothe himself with the legal title and demand possession; and from that day the statute began to run." The fifteen months here alluded to was the time which was allowed after a sale under execution for the debtor, or any other judgment creditor of the debtor, to redeem the land by paying the amount for which it sold with interest. "But," continued the court, "although the sheriff's deed made on that day would have divested the legal title from Clark and vested it in the purchaser, that fact would not have converted Clark into a tenant. From that moment he became a trespasser and might have been sued as such." Again, speaking of the defendant Clark, the court says: "His possession began under his deed as a possession hostile to all other persons; and, though the statute of limitations did not begin to run until the expiration of fifteen months from the day of the sheriff's sale, it was not because there was no adverse possession in fact until that day, but because until then there was no person in being who could bring the suit. That the sheriff's deed must be considered as having been made when the right to it accrued, so far as the statute of limitations is concerned, is conceded by counsel for appellant."

These very clearly stated views of the supreme court of Illinois must control the present case. The plaintiff's right to the marshal's deed accrued July 8, 1863. The statute of limitation began to run on that day, and the bar of seven years would have become perfect on the 8th of July, 1870. This suit, however, was commenced on the 15th of May, 1869, more than a year before the statute bar was completed.

If we are wrong in what we have supposed to be the law it must follow that, in all cases in which the owner of real estate owes money which is a lien on the land in his hands, the statute of limitation begins to run against that lien as soon as he conveys the land with possession to some one else. It can make no difference in the principle asserted whether the lien be created by a judgment or by a mortgage. Nor can it make any difference whether the debt secured by the lien be due when the conveyance is made, or has ten or twenty years to run before the lien can be enforced against the land. The principle asserted is applicable in all these cases; namely, that from the day of the conveyance, by the debtor, of the land on which the lien of the debt exists to some third person, accompanied by transfer of possession, the possession of the purchaser is adverse to the lienholder, and the limitation of seven years begins to run. If this be established to be the law the owner of real estate may borrow money on ten years' time to the value of that estate, and

give a mortgage on it to secure payment; and by a sale and conveyance of the land to a third person, with delivery of possession a week afterwards, the lien is utterly defeated. For, according to this doctrine, the statute of limitation begins to run against the mortgagee the moment the title and possession are vested in the purchaser, and the bar of the statute becomes perfect against all the world by seven years' possession; whereas the mortgagee can take no steps to foreclose his mortgage until his money comes due, three years later.

And this doctrine is asserted in the face of the fact that there is a limitation law specially applicable to the enforcement of the judgment lien by sale under execution, and of the mortgage lien by foreclosure.

§ 225. *The statute does not run against a lien creditor until he has a right of action.*

This question came before the supreme court of Pennsylvania in the case of *Coutler v. Phillips*, 20 Pa. St., 155, and was fully discussed. We will close this opinion by giving *verbatim* the closing remarks of the court in that case, so perfectly applicable to the one before us: "Lien creditors are subject to a limitation of five years; but the statute of limitations that concerns the action of ejectment has no relation to them. They have no estate in the land, no right of entry, no action to be affected by the statute. The statute bars the right of action and protects the occupant, not for his merit (for he has none), but for the demerit of his antagonist in delaying his action beyond the period assigned for it. *Sailor v. Hertzogg*, 2 Barr, 185. But what right of action has a lien creditor to delay? His only remedy is by levy and sale. He then has an estate and a right of entry. The statute may then attach; before it cannot."

The peremptory instruction of the circuit court to the jury, that the facts we have stated established a good defense, was erroneous, and the judgment must be reversed, and a new trial had; and it is so ordered.

Dissenting opinion by MR. JUSTICE CLIFFORD.

I dissent from the opinion of the court in this case for two principal reasons: 1. Because it conflicts with the decisions of the state court upon the same subject. 2. Because the statute of limitations applicable to the case began to run when the defendant acquired the open, exclusive, adverse possession of the premises, by actual residence thereon, under claim and color of title; it appearing that he continued to reside there, without interruption, for the period of seven years prior to the commencement of the suit, having entered pursuant to a contract with the owner, who had a connected title to the same, deducible of record, from the United States; and that the defendant subsequently acquired the title to the premises in pursuance of the contract, the rule being that such an adverse possession, if uninterrupted and continued for the period of seven years, is equivalent to an absolute title when confirmed by a conveyance from the party having a connected title deducible of record from the United States. Examined in the light of these suggestions, it is clear, in my opinion, that the case was properly submitted to the jury, and that the judgment founded on their verdict should be affirmed.

TERRY v. ANDERSON.

(5 Otto, 628-637. 1877.)

APPEAL from U. S. Circuit Court, Southern District of Georgia.

STATEMENT OF FACTS.—The Planters' Bank of the State of Georgia stopped payment in 1865, and in 1866 executed an assignment to Anderson and Mercer, the proceeds of which paid only a percentage of the liabilities. In 1871, on a bill filed in equity by the assignees, to which complainants and others were made defendants, the court made a decree, in obedience to which the assignees paid certain dividends and were finally discharged June 30, 1873. The charter of the bank provided that the stockholders, for the time being, shall "be pledged and bound in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, during the time he, she or they may hold such stock." The present bill of complaint was filed in 1874 by Terry and others, as holders of unredeemed bills, against said assignees and others who were stockholders in the bank; it sets forth the preceding facts; that the capital stock was not fully paid up; that the assignees never collected the balance, and prays that the stockholders be decreed to pay such sum as may satisfy complainants' demand. Further facts appear in the decision.

Opinion by WARRE, C. J.

In *Terry v. Tubman*, 92 U. S., 156, we decided that where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholder arose when the bank refused or ceased to redeem, and was notoriously insolvent; and that when such insolvency occurred prior to June 1, 1865, an action against a stockholder not commenced by January 1, 1870, was barred by the statute of limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the 1st day of January, 1870.

§ 226. *Constitutionality of a statute shortening the time within which to commence actions.*

This is a suit to enforce the liability of the stockholders of a bank, under a provision of the charter similar to that considered in *Terry v. Tubman*; and it is expressly averred in the bill that the bank stopped payment on the 20th of February, 1865, and never resumed. The affairs of the bank were closed up under an assignment made July 9, 1866, the proceeds of which paid only a small percentage upon its liabilities. The case is thus brought directly within our former ruling; but it is insisted that the act of 1869 is unconstitutional, because it impairs the obligation under which the complainants claim, and, as that question was not directly passed upon in the other case, we are asked to consider it now. The argument is, that as the statute of limitations in force when the liability of the defendants was incurred did not bar an action until the expiration of twenty years from the time the action accrued, a statute passed subsequently reducing the limitation impaired the contract, and was consequently void.

This court has often decided that statutes of limitation affecting existing

rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney*, 5 Pet., 457 (§§ 15-18, *supra*); *Jackson v. Lamphire*, 3 id., 280 (Constr., §§ 1845-48); *Sohn v. Waterson*, 17 Wall., 596 (§§ 119-20, *supra*); *Christmas v. Russell*, 5 id., 290 (Judg., §§ 1121-25); *Sturges v. Crowninshield*, 4 Wheat., 122 (Constr., §§ 1937-1939). It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Here, nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. The third section of the statute is as follows: "That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statute or acts of incorporation, or in any way by operation of law which accrued prior to the 1st of June, 1865, not now barred, shall be brought by the 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

The liability to be enforced in this case is that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank swept away by the disasters of a civil war which had involved nearly all of the people of the state in heavy pecuniary misfortunes. Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson v. Lamphire*, *supra*: "The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the

time limited shall begin to run, will generally depend upon the sound discretion of the legislature according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

The supreme court of Georgia, in *George v. Gardner*, 49 Ga., 441, held that the time prescribed in this act was not so short or unreasonable under the circumstances as to make it unconstitutional; and the circuit court of the United States for the southern district of Georgia held to the same effect in *Samples v. The Bank*, 1 Woods, 523. We are satisfied with these conclusions. The circumstances under which the statute was passed seem to justify the action of the legislature. The time, though short, was sufficient to enable creditors to elect whether to enforce their claims or abandon them.

§ 227. *The personal liability of stockholders to the creditors of a bank and the unpaid balances of their stock are alike due upon the suspension of the bank, and the statute of limitations then begins to run in favor of the stockholders.*

This disposes of the questions arising upon the individual liability of the stockholders under the charter. It still remains to consider the cases of the stockholders whose subscriptions were not paid in full at the time of the failure of the bank. For this purpose, it is not necessary to decide whether this liability passed to the assignees under the assignment. If it did not, and the present complainants have the right to sue for it, their action is barred by the statute of 1869. It was a debt due the corporation June 1, 1865; and by section 6 of that statute, all actions upon any debt or liability due a corporation, which accrued prior to that date and was not barred when the act was passed, must be brought by January 1, 1870. The case of *Cherry v. Lamar*, decided by the supreme court of Georgia in January, 1877, is not, as we understand it, at all in conflict with this. There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions; and it was consequently held that the statute did not commence to run against such a liability until the requisite call had been made and notice given. Neither in this case nor in *Terry v. Tubman* does any such provision of the charter appear. For all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them.

These complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assignment, they proved their claims, and the amount due them was found for the purposes of a dividend. The finding was sufficient for the purposes of distribution; but it has none of the characteristics of a judgment or decree, to be enforced as against anything but the fund which the court was then administering. We see nothing to take this case out of the operation of the decision in *Terry v. Tubman*, and the decree of the circuit court is therefore affirmed.

ON PETITION FOR REHEARING.

Opinion by WAITE, C. J.

In this petition it is suggested that the provision of the charter of the Planters' Bank, in respect to the liability of subscribers to the capital stock for the payment of the balances due upon their subscriptions, is substantially the same as that passed upon in *Cherry v. Lamar*; and that consequently, under the ruling in that case, the statute of limitations is no bar to this action for the recovery of balances due. This does not appear either in the record

or in the voluminous printed arguments filed at the hearing. If it was mentioned in the oral argument, it did not attract our attention.

§ 228. *The balance of unpaid subscriptions is a debt to the bank.*

But upon the facts as they are now stated the result will not be changed. The liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank. *Ogilvie v. Knox Ins. Co.*, 22 How., 380 (Corp., §§ 189-91). Consequently the balances now in controversy passed to the assignees under the assignment, which was "of all the property, estate, credits and assets of the" bank. The liability of a stockholder for his subscription is entirely different from that imposed by the charter "for the ultimate redemption of the bills" issued by the bank. The subscription inures to the benefit of all creditors, while the individual liability under the charter operates only in favor of billholders.

Since the debts due upon the subscriptions passed to the assignees, the appellants, being parties to the suit instituted by them to close their trust, had the right to insist that this part of the assets should be reduced to possession, and distributed before the trust was closed and the assignees were discharged.

§ 229. *A statutory liability is as much a matter of remedial legislation as a liability by contract.*

Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee. But here there was a trustee invested with ample powers to collect and dispose of all the assets belonging to the alleged trust fund. In a suit to which these appellants were parties one court of equity has found that this trustee has fully executed his trust, and that the fund is exhausted. That decree is a bar to any further proceeding in equity by them, as creditors of the bank before judgment, for the purpose of securing the administration of the same trust. If there are assets which the trustee did not reach, the appellants are remitted to their remedies, after judgment against the bank, to subject equitable assets to the payment of their demands. We have seen, in the former opinion filed, that they do not now occupy the position of judgment creditors.

The other questions presented by the petition for rehearing have already been sufficiently considered. A liability by statute is as much the subject of remedial legislation as a liability by contract, unless the remedy enters into and forms part of the obligation which the statute creates. Such, we think, is not the case here.

Petition overruled.

BACON v. RIVES.

(18 Otto, 99-108. 1882.)

ERROR to U. S. Circuit Court, Western District of Virginia.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This is a suit in equity. The complainants are John L. Bacon and H. E. C. Baskerville, partners as Bacon & Baskerville; John

Stewart, Robert Ould, Robert H. Maury, and Isaac H. Carrington, trustees for the benefit of the creditors of William H. Macfarland, deceased, by virtue of a deed dated October 20, 1870; John W. Wright, sheriff of the city of Richmond, and, as such, administrator of said Macfarland,—all citizens of Virginia.

The defendants are George C. Rives, a citizen of Texas, in his own right and as administrator with the will annexed of George Rives, deceased; J. Henry Rives, a citizen of Virginia, executor of George Rives, deceased; and Alfred L. Rives, a citizen of Alabama, executor of William C. Rives, deceased.

The suit was commenced on the 22d of July, 1875, in the circuit court of Albemarle county, Virginia, and was thence removed into the circuit court of the United States for the western district of Virginia, upon the petition of George C. Rives, in which the defendant Alfred L. Rives, executor of William C. Rives, united. In the latter court a demurrer to the bill was interposed by George C. Rives, upon the ground that the suit was barred by the statute of limitations both of Texas and Virginia. The demurrer was sustained and the bill dismissed. The complainants thereupon appealed.

The case made by the bill is, substantially, as follows:

In the summer of the year 1863, Bacon & Baskerville, John Stewart, Robert H. Maury, William H. Macfarland, and William C. Rives, uncle of the defendant George C. Rives, sent \$131,000 in "Confederate States treasury notes"—the currency, at that time, of Virginia, Louisiana and Texas—to James H. Stevens, then in Monroe, La., with instructions to invest or expend the same in the purchase of cotton on plantations in Louisiana and Texas, to remain thereon until the civil war was ended. Of that sum Bacon & Baskerville owned \$48,000, Stewart \$48,000, Maury \$10,000, Macfarland \$5,000, and William C. Rives \$20,000. Subsequently, however, Bacon & Baskerville became the owners of \$80,000, and Stewart of \$16,000, the interest of the other parties in the residue remaining the same as at the outset. The funds were sent to Stevens by Bacon & Baskerville, by whom all instructions were given and negotiations conducted. The proceeds of the investment, it was understood, were to be divided among the parties in proportion to their respective interests.

About the 3d of September, 1863, Stevens died in Louisiana, *en route* to Texas, without having invested any of the funds. Shortly thereafter the complainants were notified by his widow that she held the \$131,000 subject to their order. The defendant, George C. Rives, wrote to the same effect to his cousin, Alfred L. Rives, son and executor of William C. Rives. Moved by the advice and solicitation of William C. Rives, as well as by the encouraging character of certain letters written by George C. Rives to Alfred L. Rives, and exhibited to complainants, and influenced especially by the declaration of the former in his letter, that if the money was turned over to him he would act for the parties under their instructions, and save it by investing it in city property in Austin, Texas, or in property which he represented would pay well and could be readily sold at any time, the complainants made and appointed George C. Rives their agent in the room and stead of Stevens. They consequently ordered and directed the funds in the hands of Mrs. Stevens to be paid to him, and towards the close of the year 1863, or early in 1864, he received them as agent and for the benefit of the complainants, to be invested in conformity with specific instructions given by Bacon & Baskerville, the managers and business negotiators of the enterprise, with the concurrence of

the joint owners of the funds, viz: 1. To invest them in cotton on plantations in Texas, to remain thereon until the war ended, that being the first and chief object of the whole venture. 2. If that could not be done, then to invest them in ranch property, meaning lands in Texas with cattle and horses thereon. 3. If that could not be done, then to invest them in town lots in Austin.

Nothing was heard from George C. Rives upon the subject of the proposed investment until, in response to a letter from Bacon & Baskerville, under date of January 27, 1865, he wrote, under date of April 5, following, that he had invested the funds in the transportation of cotton under articles of partnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it; but he did not state who the active partner was, nor how much of the funds he had so invested, nor what property he had purchased therewith, nor what proceeds, if any, had accrued from the investment. His departures from the instructions were not approved by the complainants, and they hoped, notwithstanding their orders had been disregarded, that a fair and honest return would be made by him. After the war ended and after the expiration of eighteen months without any report or statement from him, Bacon & Baskerville, in November, 1866, wrote to him at Austin, Texas, asking an account of his agency, to which letter no reply was made. On the 26th of January, 1867, they again wrote to him at Austin, asking such account; but no reply to that letter was received. Complainants, consequently, "almost reached the conclusion that Rives had either died or left the country." But in March, 1875, learning accidentally that he was not only living but for several years then past had visited Virginia each summer, they again wrote to him asking an account of his agency. No reply came to that letter. At the same time they wrote, as they had before done, to Alfred L. Rives, asking information as to George C. Rives; but no reply was received, nor were the letters written to the latter ever returned to the writers through the dead-letter office.

As soon as possible after learning the whereabouts of George C. Rives the complainants instituted this suit, charging that his retention of the whole proceeds of the money intrusted to him, his silence for nearly ten years, and his failure to render any account, arose from an intention to defraud them out of it or the proceeds of its investment.

The bill further shows that George Rives died in Virginia in 1874, possessed of a large estate, real and personal, in which, by his will, George C. Rives, his son, had a large interest, and that J. Henry Rives and Charles Edward Rives qualified as his executors. The complainants ask that the interest of George C. Rives in that estate, in whatever form, be attached in the hands of the executors to pay whatever may be shown to be due them. Attachments were served upon the executors, and levied upon that interest. It is also averred that William C. Rives has died, and that Alfred L. Rives is his executor; that Macfarland died in 1873, having executed, on the 29th of October, 1870, a deed conveying all his property of every kind, in possession or in action, to Robert Ould and Isaac H. Carrington, trustees for the benefit of his creditors; and as no administration was had upon his estate, the same was committed to the defendant Wright, sheriff of the city of Richmond. It may be stated in this connection that, after the cause was removed from the state court, Charles Edward Rives, an original defendant, died, and George C. Rives became administrator *de bonis non* with the will annexed of George Rives.

The bill prays that the defendant be required to make, upon oath, full, true and complete answers to all the allegations of the bill; and that George C. Rives be required to render a full and complete account of all his actings and doings as agent of complainants, and show what disposition or investment he made of the funds intrusted to him, and what were the proceeds of such investment; and if no investment was made according to instructions, nor any other investment of which complainants may choose to avail themselves, that he be required to pay the value of the funds intrusted to him as agent, with lawful interest thereon.

Without waiving a full answer under oath to the bill, the complainants ask that George C. Rives be required to answer the several special interrogatories embodied therein, the object of which is to obtain from him information as to whether he had received the \$131,000 under an engagement, as agent, to invest it in the mode set out in the bill; whether he had so invested it or not,—if not, why not; if yes, in what kind of property he had invested, and what disposition had been made of it or of its proceeds; and whether, after the close of the war, he did not have in his possession property purchased, in whole or in part, with the proceeds of the investment; if so, of what did it consist, and what has been done with it.

There was also a prayer for such other and further relief as equity and justice required. Thus stood the suit when removed from the state court.

§ 230. *Mere garnishees are not such necessary or indispensable parties as to preclude the removal of a suit.*

J. Henry Rives, a citizen of Virginia, having been made a defendant, in his capacity as one of the executors of George Rives, it is contended that the suit was not removable into the circuit court of the United States. This position cannot be successfully maintained. Without giving all of the reasons which may be assigned in support of the right of removal, it is sufficient to say that he and Charles Edward Rives, executors of George Rives, had no interest in the question whether the complainants have or not a cause of action against George C. Rives on account of the matters set out in the pleadings. They were neither necessary nor indispensable parties to the issue between the complainants and the principal defendant. It was of no moment to them whether the one or the other side in that controversy succeeded. It is true that the attachment which the complainants, before the removal of the suit, sued out against George C. Rives was served upon the executors, and levied upon his interest in the estate of his father. But they were made defendants, not because of any connection they had with the main controversy, but to the end that his interest in that estate might be reached and held subject to such final decree as the complainants might obtain against him. Though made, formally, defendants, they occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties on the respective sides of the controversy which is the foundation of the litigation, being citizens of different states, the relation of the executors to the suit was properly regarded as merely incidental, arising from the necessity of preserving the means whereby the complainants might, if successful in this suit, obtain satisfaction of their demands against George C. Rives.

§ 231. *Provisions of the code of Virginia as to the operation of the statute of limitations on contracts made and to be performed in another state.*

The remaining question to be considered relates to the defense of the stat-

ute of limitations presented by the demurrer to the bill. The contention of the defendant is that the cause of action, if any, existed as far back as the close of the late civil war; that in Virginia and Texas the running of limitation was suspended by statute, in the former from some time in April, 1861, until January 1, 1869, and in the latter from some time in 1861 until March 30, 1870; that by the laws of Texas two years was the limitation to suits on oral, and four years to suits on written, contracts, while the limitation in Virginia to such suits as the present one was five years; consequently, excluding from the computation of time the periods of the suspension of the statute in the respective states, the plaintiffs' cause of action was barred. The defendant further insists that the law of Texas governs by reason of that provision in the code of Virginia which declares that "upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country." Code of Va., ed. 1873, sec. 20, p. 1002.

§ 232. *Circumstances under which a cestui que trust is entitled to a discovery from the trustee. When in such case the statute of limitations will commence running against the cestui que trust.*

In the view which the court takes of the case it is unnecessary now to determine whether reference must be had to the law of the state where the suit is pending, or to that of the state where the alleged contract was to be performed. We are not satisfied that the cause of action, as set out in the bill, was, at the commencement of the suit, barred by limitation as prescribed in either Texas or Virginia. The case, as now presented, discloses — not, perhaps, one of those technical trusts of which a court of equity has peculiar and exclusive jurisdiction, but yet — a trust, arising out of express agreement, under which the defendant, George C. Rives, received from the complainants certain funds, which he undertook to invest in particular kinds of property, in conformity with specific instructions given by those whom he represented. His duty, under the law, although the agreement did not in terms so declare, was, from time to time, as the circumstances required, to inform those whom he represented of his acts, and, upon completion of the trust, to render an account of all he had done in the premises; or, if he elected not to execute the trust, to surrender the property or its proceeds. He received the funds, as has been seen, in the latter part of the year 1863, or early in 1864. He undertook to invest them, if practicable, in cotton on plantations in Texas, to remain thereon until the civil war was concluded. Failing in that he was to invest in ranch property, or lands in Texas, with cattle and horses thereon; failing in the latter, he was to invest in town lots in Austin, in that state. He gave, so the bill avers, no information whatever of his acts until the spring of 1865, when, in response to a letter from his principals, he wrote that he had invested the funds received by him in the transportation of cotton, under articles of copartnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it. Whether that arrangement involved a violation of the laws of the United States in reference to the shipment of cotton from the insurrectionary districts does not now appear. But he withheld the name of that partner, and did not inform his principals of the result of that investment. From that time forward the defendant failed to communicate with the complainants, or any of them, as to what, if anything, had been accomplished in the execution of

his trust. To letters making inquiries, and which, in the present attitude of the case, we may assume were received, no response was made.

Taking, then, the allegations of the bill to be true, as upon demurrer we must do, the existence of the trust is clearly established; it is still open, or not wholly executed; it has never been disclaimed by clear and unequivocal acts or words brought to the notice or knowledge of the complainants or either of them; there has been no adverse holding of the original fund or of its proceeds; consequently the possession by the defendant, George C. Rives, of the proceeds of the original fund, if invested at all, may be deemed the possession of those whom he undertook to represent. But it is suggested that while the agreement did not prescribe any period within which he was to make the investment, it was necessarily implied that it was to be performed within a reasonable time; consequently, it is argued, the statute would commence running after the lapse of such reasonable time, or from the moment when complainants were entitled to enforce an accounting. *Phillips v. Holman*, 26 Tex., 276. To this it may be replied that whether the trustee was derelict in duty in not making the investment within any particular period depends upon the special facts of the case. Having agreed to all the circumstances, particularly such as were connected with the disturbed condition of the country for many years after the war closed, we cannot, upon the case made by the bill, fix the date when the defendant should, with reasonable diligence, have executed his trust, or say that there has been, upon the part of complainants, such delay as prevents them from applying to a court of equity for relief. Being called upon to execute what, consistently with the facts, as disclosed in the bill, appears to be a subsisting trust, or if it has been, in whole or in part, executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer, which relies simply upon the statutory limitation and confesses that he has kept his *cestuis que trust* in ignorance of what it was his duty to communicate. The complainants, it seems to the court, are entitled, upon well-established principles of equity, to a discovery as to the disposition, if any, which has been made of their property. Inquiry in that direction should not be cut off, since, upon the showing made, it does not clearly appear that the suit is barred by the statute of limitations. Unless otherwise distinctly declared by the statute prescribing fixed periods for the commencement of suits, the cause of action is not, ordinarily, deemed to have accrued against, nor limitation to commence running in favor of, the trustee of such a trust as the bill describes, until the trust is closed, or until the trustee, with the knowledge of the *cestuis que trust*, disavows the trust, or holds adversely to their claim.

And such seems to be the doctrine of the supreme court of Texas, by the laws of which state, the defendants insist, this case is to be determined as to the question of limitation. *White v. Leavitt*, 20 Tex., 703; *Grumbles v. Grumbles*, 17 id., 472. In the first of these cases a recovery was sought by the plaintiff for the recovery of the value of certain goods consigned for sale to the defendants therein, and which had never been accounted for. The suit was not commenced until four years after the goods came to the hands of the consignees for sale. It was said by the court: "The proof shows that the goods were held and disposed of by White & Co. in trust for Leavitt, and there being no evidence that the trust was ever repudiated, the statute of limitations [two years] did not run upon the cause of action, as it has often been decided by this court."

It is also suggested that the bill concedes that the complainants were informed by defendant in the year 1865 that he had invested the funds placed in his hands in a way not authorized by the instructions given him, and consequently, it is argued, the complainants had then a cause of action to recover such damages as they had sustained by reason of the disregard of their instructions. It may be that, upon final hearing, when the facts are fully disclosed, the court may be bound to hold the complainants estopped to complain of his departure from the instructions under which he received the funds in question. Even then, so far as can be now determined from the allegations in the bill, he would be liable to account for the proceeds, if any, of his investment "in the transportation of cotton under articles of partnership," in the same way that he would be required to account for the proceeds of investments made in conformity to his instructions. It does not appear from the bill that the defendant intended, by investing in the particular mode stated in his letter, to assume a position of hostility to his principals, or to hold the proceeds, if any, of that investment, in his own right.

As, therefore, it does not clearly or distinctly appear from the bill that the suit was barred by limitation, the demurrer should have been overruled. The facts, when fully developed, may present an altogether different case from that now disclosed. We can only consider the question of limitation in the light of the facts alleged in the bill. Decree reversed, and cause remanded for further proceedings in conformity with this opinion.

§ 233. *In general.*—Limitation begins to run against an unliquidated demand from the time the cause of action accrues. *Ex parte Storer*, Dav., 300.

§ 234. The statute of limitations begins to run when there is a legal right to sue and a legal liability to be sued. *Ruppel v. Patterson*, 1 Fed. R., 221.

§ 235. If there is a settlement after the cause of action has accrued the statute runs from the date of the settlement. *Ex parte Storer*, Dav., 301.

§ 236. Where a protested bill of exchange is taken up partly with cash, partly with the proceeds of a note discounted by the bank holding the bill, the latter is paid, and any action to recover back any part of it might then be brought. The statute of limitations runs against such action from the payment of the bill. *Bank of the United States v. Daniel*, 12 Pet., 32.

§ 237. The limitation provided by section 8 of the law of 1849, limiting the time within which to make claims under an award, under the treaty with Mexico of 1848, does not run against an assignee in bankruptcy until the bankrupt gets possession of the money. *Clark v. Clark*, 17 How., 315.

§ 238. Where money is deposited with another to pay a debt, and he fails to do it in a reasonable time, *assumpsit* lies and limitation runs in his favor. *Biapham v. Price*, 15 How., 162.

§ 239. Where a subcontractor is to receive his pay only as the contractor receives his pay for the work on the final estimates, the statute will not run against him until he has notice that the contractor has received the money, or until he has demanded his pay. *Chew v. Baker*, 4 Cr. C. C., 636.

§ 240. *Agent.*—A., acting as agent for B., sold bonds belonging to the latter at fifty cents on the dollar, but only accounted at the rate of thirty-seven cents on the dollar. In an action by B. against A. to recover the difference, *held*, that the statute of limitations did not commence to run against the claim of B. until he was apprised of the fact that the bonds were sold at a higher rate than that at which A. had accounted, and that, the statute period not having elapsed between the discovery by B. of the fraud practiced upon him and the commencement of the action, the claim was not barred. *Dunlevy v. Mowry*,* 2 Bond, 214.

§ 241. *Non assumpsit* within five years, etc., is not a good plea to an action of *assumpsit* upon a promise to collect money and account for it. The cause of action does not arise until the money has been received by the defendant and demanded by the plaintiff. *Gardner v. Peyton*, 5 Cr. C. C., 531.

§ 242. *Administrator's bond.*—The statute of limitations of Maryland begins to run on the bond of an administrator in favor of the obligors at the time of its approval. *Maryland v. Todd*,* 1 Biss., 69.

§ 243. *Alcalde grant in California.*—By the California statute of limitations, as amended in 1855, the statute did not begin to run against parties claiming under an alcalde grant until its final confirmation by the United States government or its legally constituted authorities. By the amendment of April 18, 1863, it commenced to run in favor of one in possession, if the owner was out of possession, at that date, and the title would have been good after five years. So held where the plaintiffs had been in possession from 1851 until 1867, when they were evicted by defendants, who claimed under an alcalde grant of 1847, which was confirmed by congress on March 8, 1866. The action was brought to recover possession on the ground that the plaintiffs had not been parties to the ejectment suit. *Palmer v. Low*,* 2 Saw., 248.

§ 244. *For moneys collected.*—The statute of limitations does not begin to run in favor of an attorney for money collected and not paid over, until demand, directions to remit, or some equivalent act. *Sneed v. Hanly*,* *Hemp*, 659; *Gardner v. Peyton*,* 5 Cr. C. C., 561.

§ 245. *Debts due British creditors before the Revolution.*—The plaintiff in error was surviving partner of a Glasgow firm. David Bell, the defendant's testator, was their debtor, on a debt due in 1768. In 1773 the defendant became surety for the debt. The plaintiff had never been resident within the limits of the colony or state of Virginia, of which defendants were citizens. The company had a factor for collection within the colony and state, from 1773 to the commencement of the Revolution, and from 1784 to the time of commencing the suit. British creditors were prevented from enforcing their demands from 1774 until 1790. This action was commenced in 1803. It was held that as the debt was not barred before the commencement of the war, the treaty of peace did not admit the adding the time previous to the war to any time subsequent to the treaty in order to make a bar. *Hopkirk v. Bell*,* 3 Cr., 454.

§ 246. *The statutes of limitation commenced to run against debts due British creditors from the final ratification of the treaty of peace between Great Britain and the United States.* So held in an action commenced in 1798, on a bond given by defendant's testator to plaintiff's testator in 1775. The plaintiff's testator was, and, until his death, continued to be, a subject of the king of Great Britain. The defendant's testator was a citizen of North Carolina. *Ogden v. Blackledge*,* 2 Cr., 272.

§ 247. *Collector of revenue.*—A collector of customs was not personally liable to a suit to recover duties illegally exacted from 1839 to February 26, 1845, and the statute of limitations did not begin to run in his favor until that date. Thus, where an action was brought in February, 1850, to recover moneys illegally exacted for duties between February, 1843, and March, 1844, it was held that the statute of limitations of six years was not a defense. *Richardson v. Curtis*,* 3 Blatch., 385.

§ 248. *Contracts.*—In an action upon a contract, where it was agreed that the plaintiff should participate with the defendant in his subscription, to a certain amount, with every advantage he would have if he were actually a subscriber, and the defendant acquired a certain number of shares with money received from plaintiff, and on October 2, 1816, received interest on the same; but on November 25, 1816, the bank rescinded the resolution to pay interest, and on January 7, 1817, passed a resolution restoring to those subscribers who had paid the interest under the first resolution the sums so paid by them, *held*, that the statute commenced to run from October 2, 1816. *Astor v. Girard*,* 4 Wash., 711.

§ 249. *County warrants—Arkansas.*—In Arkansas, where a county may be sued on the warrants issued by it and be compelled by a *mandamus* to levy a tax to pay judgments recovered thereon, the statute of limitations begins to run on the warrants from the day on which they are payable. *Goldman v. Conway County*,* 3 McC., 327.

§ 250. *Crime.*—Under the act of 1864, making it a crime for an attorney or agent to withhold pension moneys, there must be some unreasonable delay, some refusal to pay on demand, or some intent to keep the money wrongfully from the pensioner, to constitute an unlawful withholding within the meaning of the act. The offense is not a continuing one, being committed repeatedly until the money is paid over. Whenever the act or series of acts necessary to constitute a criminal withholding of the money has transpired the crime is complete, and from that day the statute of limitations begins to run against the prosecution. *United States v. Irvine*,* 8 Otto, 450.

§ 251. *Disseizee.*—If, at the time the act of limitations of Pennsylvania of 1785 was passed, a person was disseized, he was bound to bring his action within fifteen years; but if he were afterwards disseized, the act of limitations would begin to run from the ouster and would not be a bar in less than twenty-one years. So the jury was charged in an action to recover certain lands in Pennsylvania, brought in 1805, in which the plaintiff claimed under an order of the proprietors in 1773 and a survey in 1774, and defendant under a possession taken in 1789. *Penn v. Ingham*,* 3 Wash., 90.

§ 252. *Fraud.*—Where an action was brought in Kentucky to recover of defendant, as executrix, a sum of money which it was alleged was expended and lost by reason of and upon fraudulent pretenses and representations made by defendant's testator to plaintiff, and the an-

swer of defendant traversed the allegations of the petition and pleaded and relied upon the statute of limitations of five years, *held*, that the burden of alleging and proving the time of the discovery of the fraud was upon the plaintiff, notwithstanding the fact that in the form of pleading the defendant assumed the burden and alleged the time of the discovery of the fraud; and as it was neither traversed nor avoided by the plaintiff, the defendant was entitled to judgment. *Barlow v. Arnold*,* 6 Fed. R., 351.

§ 253. The statute of limitations does not begin to run in favor of an adverse possession founded in fraud until the fraud is or might have been discovered. So held in an action commenced in 1824 to establish a claim to real property, which had been pre-empted in 1784 by complainant, and the entry was assigned in the same year to Joseph Erwin, who reconveyed the land, part in 1811, and part in 1793; the defendant Williams was a deputy surveyor, and, it was claimed, had in 1792 made a fraudulent survey for the purpose of securing to himself part of the land, and that he conveyed to the other defendants with knowledge, on their part, of the fraud. *Mitchell v. Thompson*,* 1 McL., 96.

§ 254. The statute of limitations does not begin to run on a cause of action arising from fraud, until the fraud is discovered. By the Missouri statute a discovery of the fraud must be made within ten years. *Martin v. Smith*, 1 Dill., 83.

§ 255. If the bankrupt and the promisor of a note fraudulently conceal the cause of action from the assignee from the moment when his title accrues, the two years' limitation in the bankrupt act does not begin to run; but a fraudulent concealment after the assignor's title accrued is not sufficient to prevent the running of the statute. *Pritchard v. Chandler*, 2 Curt., 488.

§ 256. Judgments.—The Maryland statute of limitations of 1715, which provides that no judgment shall be good after the thing in action is above twelve years' standing, does not run from the date of the judgment if it has been revived by *scire facias* within twelve years. The words "twelve years' standing" mean standing without any proceeding towards enforcing. The revival of the judgment causes the statute to begin to run anew from the date of revival. So held where a *scire facias* had been sued out to revive a judgment obtained in 1820, which had been revived by an award of execution in 1826. *Digges v. Eliason*,* 4 Cr. C. C., 619.

§ 257. Stockholders.—The statute of limitations of four years of South Carolina is applicable to the statutory liability of stockholders in a bank for unpaid subscriptions, and commences to run at the time the bank suspends payment. *Terry v. McLure*,* 13 Otto, 442.

§ 258. The charter of the Bank of Augusta, Georgia, provided that the individual property of its stockholders should be bound for the ultimate redemption of bills issued by it in proportion to the number of shares held by them respectively. The bank failed prior to June 1, 1865, and assigned its property for the benefit of its creditors January 6, 1866. The plaintiff brought his action in 1872 to recover the par value of notes issued by it prior to June 1, 1865, against the defendant, a stockholder, for the amount of his unpaid subscriptions. *Held*, that the cause of action accrued prior to June 1, 1865, and, according to the statute of 1869, was barred by act of January 1, 1870. *Terry v. Tubman*,* 2 Otto, 156.

§ 259. An agreement between a corporation and its stockholders, that, having paid a part of their stock, they should not be called on to pay more, is valid between the parties, but void as to creditors; but no cause of action arises in favor of the creditors or the assignee in bankruptcy until there is an order of court to that effect, and not till such order is made does the statute of limitations begin to run. *Scovill v. Thayer*, 15 Otto, 143.

§ 260. Tax title.—The statute of Illinois does not run by relation. It does not begin to run in favor of one in possession claiming title or color of title under a tax deed until the deed is delivered. So charged in an action of ejectment where defendants claimed title under a sale for taxes in 1839, and the deed was not issued until 1850, subsequent to the commencement of the action. *Holden v. Collins*,* 5 McL., 189.

§ 261. Trustees.—The statute of limitations runs in favor of a trustee when he has parted with all control over the property and is discharged. *Clarke v. Boorman*,* 18 Wall., 493.

§ 262. The statute of limitations begins to run in favor of a trustee who received money for his *cestui que trust*, from the time of a demand and refusal thereof, and not before. *Taylor v. Savage*, 5 How., 276.

§ 263. Grantee of United States.—The statute of limitations does not begin to run against one claiming under the United States until the legal title has passed to him. *Shuffleton v. Nelson*,* 2 Saw., 541.

§ 264. The state statute of limitations does not run against the grantee of the United States before the issuing of the patent. So held in an action to recover certain lands where a certificate had been issued in 1811 to plaintiff's remote grantee and the patent was issued in 1862, and the defendants relied on the state statute of limitations. *Gibson v. Chouteau*, 13 Wall., 92.

§ 265. Possession of public lands, though long continued, cannot avail as a title against a grantee of the United States. *Burges v. Gray*, 16 How., 48.

§ 266. The statute of limitations cannot begin to run while the legal title is in the United States, although a private person holds an equitable claim. *Maguire v. Tyler*, 8 Wall., 650.

§ 267. The mere open, exclusive and uninterrupted possession of public land for twenty years will not enable a party to maintain ejectment against one who enters it under a title derived from the government. The legal title being in the United States, the statute of limitation raises no bar to the action. *Oaksmith v. Johnston*, 2 Otto, 343.

§ 268. Adverse possession of public lands can give no title against the holders of subsequent patents. *Morrow v. Whitney*, 5 Otto, 551.

§ 269. Official bond.—Actions against the sureties on a postmaster's bond must be brought within two years after default made. So held in an action commenced in June, 1861, for defaults committed by a postmaster on March 31, 1856, and in every succeeding quarter down to June 30, 1860, by failure to render accounts; the defendants set up the act of March 3, 1825. *United States v. Mark*,* 8 Wall. Jr., 358.

§ 270. The statute of limitations of two years runs in favor of sureties on a postmaster's bond from the time default is made. *Postmaster-General v. Fennell*,* 1 McL., 217.

§ 271. Negotiable paper.—The statute of limitations begins to run on a note payable on demand at its date. So held in an action on a promissory note payable on demand, and which was dated more than twelve years before the action was commenced, and the state statute barred the action in two years. *Bartlett v. Rogers*,* 3 Saw., 62.

§ 272. Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place and a dishonor there; therefore the statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor. *Piquet v. Curtis*, 1 Sumn., 478.

§ 273. Where a note is payable on demand, the statute of limitations will not run until demand made. *Lee v. Cassin*, 2 Cr. C. C., 112.

§ 274. Feme covert.—The statute of limitations of Illinois begins to run against a *feme covert*, who joins with her husband in a conveyance of the lands, the husband having a life estate therein, upon the termination of his life estate, whether by death or the force of the statute. *Gregg v. Tesson*,* 1 Black, 150.

§ 275. The limitation act of Missouri of 1818 did not commence to run against *femes covert* until discovery, after which it required twenty years to complete the bar. *Meegan v. Boyle*, 19 How., 130.

§ 276. Interest coupons when severed from the municipal bonds to which they were originally attached are, in legal effect, equivalent to separate bonds for the different instalments of interest, and the like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and the statute of limitations begins to run against such coupons from their respective maturities, and not from the maturity of the bond. *Clark v. Iowa City*,* 9 West. Jur., 113; 20 Wall., 583.

§ 277. Claims against United States.—The right of action on a contract entered into with the United States accrues when the government gives notice to stop the performance of the contract, and the statute of limitations will begin to run against the claim from that date although the period fixed by the contract for its performance may not have expired. *Shinimens v. United States*,* 10 Ct. Cl., 465.

§ 278. Where one seeks to recover from the government taxes paid under an erroneous assessment, he must bring his suit within six months from the decision of the commissioner of internal revenue on his appeal from the assessment, and it is necessary that an appeal be first made to the commissioner. *Chentham v. United States*, 2 Otto, 85.

§ 279. A claim presented in due time to the proper department is not barred by subsequent delay not caused by the laches of the claimant, and the government cannot in such case plead the statute of limitations. *United States v. Lippitt*, 10 Otto, 663.

§ 280. A creditor of the United States who resided in the southern states, and participated in the rebellion against the United States, was at liberty to prosecute his claims in the proper federal court by taking advantage of the proclamation of May 29, 1865, which offered amnesty upon the single condition that an oath of allegiance to the constitution of the United States, and the union of the states thereunder, be taken; hence the statute of limitations began to run against the claim of such creditor from the close of the war, and not from the general amnesty proclamation of December, 1868. *Sierra v. United States*,* 9 Ct. Cl., 224.

§ 281. And where such a creditor neglected to take the oath of allegiance and died before the proclamation of 1868, held, that his administratrix did not have six years from the time she became the subject of that amnesty within which to bring a suit upon his claim, but that the statute having begun to run in the life-time of her intestate its operation was not arrested by his death. *Ibid.*

§ 282. In suit brought against the United States to recover for transportation under an army contract, the claimant introduced in evidence the voucher of the quartermaster-general,

in which November 16th was stated as the day when compensation was due to him for the service. *Held*, that, as there was no evidence tending to show that performance was completed on any later day, the claim must be deemed to have accrued on that day, if not before, and that the statute of limitations began to run on that day. *Buckley v. United States*,* 8 Ct. Cl., 517.

§ 283. Adverse possession.—The California statute of limitations began to run in favor of one holding adverse possession of lands within the charter limits of the city of San Francisco at least from the date of the act of congress of July 1, 1864, to settle land titles in California, at which time the title of the city to the municipal lands within the limits embraced by the Van Ness ordinance became final. *Harris v. McGovern*,* 2 Saw., 515.

§ 284. The California statute of limitations begins to run against a confirmed Mexican grant, located under the act of June 14, 1860, from the date of the issue of the patent, and not from the date of the final location. *Le Roy v. Carroll*,* 3 Saw., 66.

§ 285. Where a devise for life was given to a daughter with remainder to her sons as tenants in common, the possession of an occupant is not adverse to the remainderman until the death of the life tenant. *Webster v. Cooper*, 14 How., 488.

§ 286. The statute of limitations only begins to run from the time the adverse possession is known to the party seeking to recover. *Willison v. Watkins*, 3 Pet., 43.

§ 287. An adverse judgment against tenant in possession is an eviction, in Louisiana, from which the statute of limitations runs in favor of the warrantor. *Flowers v. Foreman*, 23 How., 132.

§ 288. The purchase of an outstanding title is an eviction from which the statute of limitations runs. *Flowers v. Foreman*, 23 How., 147.

§ 289. The statute of limitations founded on possession did not begin to run against the imperfect Mexican title by which pueblo lands were held until the passage of the act of congress of July 1, 1864, perfecting such titles. *Palmer v. Low*, 8 Otto, 1.

§ 290. The statute of limitations pleaded in favor of possession by a mortgagor does not run till demand made upon him and refusal to return the property. *Almy v. Wilbur*, 2 Woodb. & M., 371.

§ 291. Under the New Jersey statute of limitations of 1787, the thirty years begin to run not from the time when possession is taken but from that when the right commenced, as the possession must be founded on a proprietary right or be obtained by a fair, *bona fide* purchase of the land, of some person in possession, and supposed to have a legal title thereto. *West v. Pine*, 4 Wash., 691.

III. LIMITATIONS IN EQUITY (EXCLUSIVE OF ACTIONS AFFECTING THE TITLE TO REAL PROPERTY).

1. *Effect of the Statute.*

SUMMARY — *Limitation by analogy to the statute of limitations*, § 292.

§ 292. The Exchange Bank of Columbia was incorporated in 1852. Its charter provided that each stockholder, in the event of the failure of the bank, should be liable for a sum not exceeding twice the amount of his shares. The bank failed in February, 1865, and the appellees filed a bill in equity seeking to make the appellants individually liable as stockholders. It was held that if the appellees had sued at law their claim would have been barred by the South Carolina statute of limitations, and that it was, therefore, barred also in equity. *Carrol v. Green*, § 293.

[NOTES.— See §§ 294-310.]

CARROL v. GREEN.

(2 Otto, 509-516. 1875.)

APPEAL from U. S. Circuit Court, District of South Carolina.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— A number of important questions arising in this case have been fully argued, which we shall pass by without remark. We have

not examined any of them exhaustively, and have not found it necessary to do so. Our judgment will be placed upon the defense of the statute of limitations, and our opinion will be confined to that subject.

The appellees filed this bill, and the subpoenas were issued in the court below, on the 18th of June, 1872. The bill seeks to make the appellants individually liable as stockholders of the Exchange Bank of Columbia, which was incorporated by an act of the legislature of South Carolina of the 16th of December, 1852. It is alleged in the bill, that, by this act, the Exchange Bank "was endowed with the same rights and privileges, and was made subject to the same duties, liabilities, obligations and restrictions, provided for the said Planters' and Mechanics' Bank;" and that by the fourth section of the act incorporating the last-named bank, it was declared "that, in case of the failure of said bank, each stockholder, copartnership, or body politic, having a share in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her or their share or shares."

§ 293. *Failure of bank; bill against stockholders; statute of limitations a bar in equity the same as at law.*

It is conceded for the purposes of this opinion that the provision quoted from the act of 1852 applies to the stockholders of the Exchange Bank as well as to the bank itself. The master found, and the court below affirmed the finding as correct, that the Exchange Bank failed in the month of February, 1865, and never resumed business after that time.

The defendants severally set forth in their answers "that the cause of action stated in the bill did not accrue within four years before the exhibiting of said bill." The complainants replied, and took issue. It appears that the bank suspended specie payment several years before its failure at the time specified by the master; and some stress is laid upon this fact by the counsel for the appellants in discussing the case in this aspect. We have preferred to adopt the finding of the master because it is the view most favorable to the appellees, and because the proof as to that period brings the case clearly within the terms of the statute; while the proof is further that the bank paid specie until its suspension was legalized, and that, if it had been put in liquidation on the 1st of February, 1865, it could then have met all liabilities, and redeemed its outstanding bills in specie or its equivalent. Its subsequent losses arose from the war. According to the statute, the liability of "each stockholder" arose upon "the failure of the bank." The liability gave at once the right to sue, and, by necessary consequence, the period of limitation began at the same time. From the last of February, 1865, four years expired on the 1st of March, 1869. But there are certain interruptions of the running of the statute to be taken into account. An act of the legislature of the state, of the 21st December, 1861, suspended the statute of limitations until the close of the first session of the next general assembly. This suspension was continued by successive acts. The last one was passed on the 22d of December, 1865, and prolonged the suspension "until the adjournment of the next regular session of the general assembly." The supreme court of the state held that these acts arrested the effect of the statute of limitations from December 21, 1861, until December, 1866. *Wardlow v. Buzzard*, 15 Rich., 158.

It does not appear in the case at what time in December, 1866, the general assembly adjourned. From December, 1866, the statute was in full force.

Four years from that time expired in December, 1870. The war in South Carolina ended on the 2d of April, 1866. The Protector, 12 Wall., 701.

The circuit court of the United States for South Carolina was open for business on and after the 12th of June, 1866. In any view of the facts that can be taken, more than four years elapsed after the statute began to run before this suit was instituted. The statute of limitations of South Carolina in force when this cause of action accrued, and under which the case must be decided, was that of 1712. Angell on Lim., App., p. 98.

The sixth section declares, among other things, "that . . . all actions of account *and upon the case* (other than such accounts as concern the trade of merchandise), . . . all actions of debt *grounded upon any lending or contract without specialty*, all actions for arrearages of rent reserved by indenture, all actions of covenant, . . . which shall be brought at any time after the ratification of this act, shall be commenced and sued within the time of limitation hereafter expressed, and not after; that is to say, *the said actions upon the case* other than for slanders, and the said actions for accounts, . . . *and the said actions for . . . debt*, . . . within three years next after the ratification of this act, or within four years next after the cause of such actions or suits, and not after." The statute contains no exception as to actions on the case, save that for slander. All others are expressly barred at the expiration of the time named.

The section of the act of 1852 above quoted, which is said to create the individual liability here in question, is silent as to who shall sue. The suit was, therefore, necessarily to be brought by and for the benefit of the parties injured. 2 Inst., 650; Com. Dig., Debt, A, 1.

Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise. The section is silent as to a preference to any class of creditors. All, therefore, in this case, stood upon a footing of equality, and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity. Pollard v. Bailey, 20 Wall., 521 (Corp., §§ 360-61).

They were severally compellable to contribute according to the amount of the stock they respectively held, and the liabilities of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed in any event twice the amount of his stock. Bank of Circleville v. Iglehart, 6 McLean, 568 (Eq., §§ 167-68). It is obvious from this statement that, if there had been a suit at law against the stockholders, debt could not have been maintained. The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages. 1 Ch. Pl., 108, 113; Stockwell v. United States, 13 Wall., 542.

"The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and *in numero*." "Case, now usually called *assumpsit*," is founded on a contract express or implied. 1 Ch., 99; Metcalf v. Robinson, 2 McLean, 364. Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to certainty; and there was clearly an implied promise on the part of the stockholders.

The legislature created the corporation and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of

the state. It could be accepted or declined. There was no constraint. By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been case.

Case is a generic term which embraces many different species of actions. "There are two, however, of more frequent use than any other form of action whatever; these are *assumpsit* and *trover*." Steph. Plead., 18. "The more legal denomination of the action of *assumpsit* is trespass on the case upon promises." 3 Woodison's Lect., 168. This form of action originated, like many others, under the statute of Westminster 2, 13 Edward I., chapter 24, section 2. Its establishment was strenuously resisted through several reigns. 2 Reeves' Hist., 394, 507, 608. It was sustained, upon full consideration, in Slade's Case, 4 Coke, 92, which was decided in 44 Elizabeth. When the statute of South Carolina of 1712, here in question, was enacted, the term *case* was as well understood to embrace *assumpsit* as anything else in the law of procedure to which it is now held to apply.

Blackstone thought that one of the most important amendments of the law during the century in which he lived was effected "by extending the equitable writ of *trespass on the case*, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process." 4 Com., 442. But if debt were the proper form of action if this were a suit at law, the result must be the same. The act bars "all actions of debt" grounded upon any lending or contract without specialty; also "after the lapse of four years." The contract here was of the class last designated. The statute was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part, and it was without specialty.

Where a deed-poll was executed by a lessor, and the lessee entered and enjoyed the premises, it was held that he was liable according to the terms of the lease, but that he was suable only in *assumpsit*. Goodwin v. Gilbert, 9 Mass., 484; Newell v. Hill, 2 Met., 180. So where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase money, and it may be recovered; but the action must be in case, and not debt on the specialty. Butler v. Lee, 11 Ala., 885; Bowen v. Bell, 20 Johns., 338; Wilkinson v. Scott, 17 Mass., 249.

In Lindsay v. Hyatt, 4 Ed. Ch., 104, the act of incorporation declared that the directors and stockholders might be sued for the debts of the corporation, either at law or in equity, as if they were joint debtors or copartners. The vice-chancellor said: "It appears to me that the six years within which actions on simple contract indebtedness must be brought does apply." Speaking of a suit at law, he said: "In such an action, the declaration must be in case founded on the statute. . . . The form of the action and the nature of the liability to be enforced fall within the provisions of the statute which takes away the right to sue after six years."

Corning v. Horner & McCullough, 1 Comst., 58, was a suit at law against stockholders upon a similar statute, and involving the same statute of limitations. It was said that the action must "necessarily be an action on the case at common law upon the liability of the stockholders for the debt of the com-

pany." The same conclusion was reached as to the time when such actions were barred as in *Lindsay v. Hyatt*. *Baker v. The Atlas Bank*, 9 Met., 182, was a bill in equity founded upon a statute making the stockholders liable in the cases specified. The defendant relied upon a statute of limitations which declared that "all actions founded upon any contract or liability not under seal shall be commenced within six years after the cause of action shall accrue, and not afterwards." It was held that the statute applied in equity as well as at law, and that, after the lapse of six years, the bar was complete.

The *Commonwealth v. Cochituate Bank*, 3 Allen, 42, was also a case in equity involving a statute creating a liability on the part of the stockholders of the bank, and the same statute of limitations. The same conclusions were reached by the court as in the preceding case. It is insisted by the learned counsel for the appellees that while the limitation act of 1712 provided that "actions of debt upon any lending or contract without specialty" should be brought within four years, it did not limit actions of debt upon specialties; and that the liability here in question, being created by a statute, is to be regarded as falling within the latter class.

It is said that an obligation to pay money, arising under a statute, is a debt by specialty. In support of this point, *Bullard v. Bell*, 1 Mason, 243, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in *Baker v. The Atlas Bank* and in *Corning v. McCullough* without effect. We think it is distinguishable from the case in hand in several material points. If it be in conflict with the cases to which we have referred in this connection, we think the results in the latter were controlled by the better reason.

If a claim like that of the appellees sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it.

Decree reversed, with directions to dismiss the bill.

§ 294. In general.—In cases of concurrent jurisdiction, such as matters of account, fraud, etc., courts of equity act in obedience to the statute of limitations and put the same construction on it as the courts of law. In case of equitable rights they follow the statute by analogy. (*a*) *Sherwood v. Sutton*,* 5 Mason, 143; *Bank of Louisiana v. Stafford*, 12 How., 327; *Hall v. Russell*, 3 Saw., 506; *Thomas v. Harvie*, 10 Wheat., 146; *Dexter v. Arnold*, 3 Sumn., 155; *Town v. De Haven*, 5 Saw., 146.

§ 295. The statute of limitations does not, in its terms, apply to courts of equity; but lapse of time, independent of the statute, is often a bar in equity. In cases that are within the statute, equity ordinarily follows the law, and will hold the statute to be a bar to equitable relief when it is a bar at law. But in cases of concurrent jurisdiction, as of fraud, equity sometimes goes beyond the law, and holds lapse of time a bar to equitable relief, when the prescription is not fully acquired at law. *Ferson v. Sanger*, Dav., 252; 5 N. Y. Leg. Obs., 48.

§ 296. The statute of limitations binds courts of equity as well as law in cases of concurrent jurisdiction. Hence, the statute of limitations of Rhode Island, of suits brought against executors and administrators, is a good bar in equity as well as at law where no equity is stated in the bill. *Pratt v. Northam*, 5 Mason, 95.

§ 297. Miscellaneous.—A court of equity will never interfere in opposition to conscience or good faith, nor to remedy the consequences of laches or neglect or want of reasonable diligence, nor where the party seeking relief does not come in with clean hands. *Creath v. Sims*, 5 How., 192.

(a) The same doctrine as to the effect of the statute of limitation was applied in *Harpending v. The Dutch Church*, 16 Pet., 455 (§§ 57-64); *Terry v. Anderson*, 5 Otto, 628 (§§ 226-29); *Same v. McLure*,* 13 Otto, 442; *Same v. Tubman*,* 2 Otto, 156; *Hayman v. Keall*,* 3 Cr. C. C., 325 (which last case was a creditor's bill filed to sell land of a deceased debtor); and *Lupton v. Janney*,* 13 Pet., 381.

§ 298. Courts of equity are never active in lending their aid to stale and neglected claims. The maxim of such courts is *vigilantibus, non dormientibus leges subveniunt*. *Lupton v. Janney*, * 13 Pet., 381.

§ 299. Among the cases in which a court of equity has been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are (1) those in which public convenience requires that there shall be a speedy end of strife; (2) others, in which some of the principal parties in the transactions sought to be reviewed are dead and their vouchers lost; (3) others, in which the court could not be certain, from lapse of time, that relief apparently proper would certainly be just; (4) others, where the disturbance of purchasers or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons. *Etting v. Marx*, 4 Fed. R., 673.

§ 300. At law, time is an essential part of the contract, but in chancery it is considered in connection with the circumstances of the case. Chancery will not disregard time as immaterial, but if the party can show that he has been prevented by inevitable accident, or by any justifiable excuse, from performing his part of the contract, at the time stipulated, and the other party has suffered no material injury by the delay, the court will not withhold its aid. *Longworth v. Taylor*, 1 McL., 395.

§ 301. Where a party has failed to execute his part of a contract without sufficient excuse, and there has been no acquiescence in the delay by the other party, a court of equity will not decree a specific execution of the contract. The party who asks the court to aid him must show reasonable diligence in doing, or attempting to do, what he agreed to perform. *Ibid*.

§ 302. Courts of equity are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would be a bar to a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and a case at law on which the statute of limitations would operate. *Putnam v. New Albany*, 4 Biss., 365.

§ 303. The terms of the act of congress do not reach the federal courts when sitting as courts of equity; and yet it is certain that, as courts of equity, they do recognize and allow lapse of time as a defense, in precise analogy to the statutes of limitation, in cases where such analogy is appropriate. *In re Cornwall*, 9 Blatch., 128.

§ 304. In the absence of laws limiting suits in equity, the laws of limitation as to similar demands in courts of law are considered as proper rules to be observed in courts of chancery. *Cleveland Ins. Co. v. Reed*, 1 Biss., 191.

§ 305. Statute of limitations available defense in equity by legal title against equitable title. *Fussell v. Hughes*, 8 Fed. R., 395.

§ 306. The statute of limitations is not a positive bar in equity, unless where there are great laches on one side, and the positive denial of right on the other is very cogent. *Wood v. Dummer*, 8 Mason, 308.

§ 307. The Maryland statute of 1715, barring actions on bills, bonds, judgments, contracts and other specialties, if the same are of twelve years' standing, does not apply to suits in chancery for the recovery of money secured by a mortgage or equitable lien on real estate, or to mortgages in any way or of any description. Courts of equity will afford relief in such case at any time within which an ejectment might be sustained. *Peters v. Suter*, * 2 MacArth., 516.

§ 308. Where possession has been taken of property purchased, and valuable improvements made, the acquiescence of the vendor may be presumed; and a delay of payment under such circumstances, where the vendor sustains no damage which interest will not compensate, will not bar a bill for a specific execution of the contract. Where time is made an essential part of the contract, the rule is different. *Mason v. Wallace*, 3 McL., 148.

§ 309. Where a complainant is compelled to have recourse to a court of chancery, on the ground that he cannot be plaintiff in an action at law, he is subject to the same rules of prescription as if he were in a court of law. So held in an action on a judgment obtained by the Planters' Bank in Mississippi. The charter of the bank had been forfeited, and the complainants, being assignees of the judgment, could not sue at law in their own name or in that of the bank because it had ceased to exist. They therefore brought suit in equity, and the court applied the statute of limitations to the claim. *Bacon v. Howard*, * 20 How., 22.

§ 310. Certain mill owners having by articles of agreement associated themselves for the purpose of constructing reservoirs, etc., to improve the flow of the stream, and agreed that there should be a lien on their respective estates for the share of the expenses which each was to pay, held, that this agreement was an equitable lien, and as such was not barred by lapse of less time than was sufficient by the local law to bar a suit for the foreclosure of a legal mortgage. *Clark v. Southwick*, 1 Curt., 297.

2. *Laches.*

SUMMARY — *General rule in equity, § 311. — Acquiescence in misconduct of trustee, §§ 312, 313. — The state cannot be guilty of laches, § 314.*

§ 311. In cases of concurrent jurisdiction, courts of equity are bound by the statute of limitations; in other cases involving titles or claims touching real estate, they act by analogy; and in others the courts, acting upon their doctrine of discouraging antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the ascertainment of adverse rights. *Godden v. Kimmell*, §§ 315-18.

§ 312. Long acquiescence in the misconduct of a trustee, connected with knowledge of the misconduct, will bar the remedy in a court of equity. A trust was created in 1826 by Berry in favor of his daughter-in-law, a widow, and his three unmarried daughters, the trust to terminate on the marriage of the widow, or when one of the children reached her majority. The property was wasted by Berry's widow, and in 1832 the trustee was held by a state court not to have been guilty of misconduct. The property was sold and the proceeds divided in 1834, except the share of one daughter. The widow married in 1843 and the trustee died in 1866. One of the daughters became of age in 1839. A suit brought in 1867 for waste prior to 1830 was held barred on account of laches and acquiescence. *Hume v. Beale*, §§ 319-21.

§ 313. In cases of trust equity will grant relief only if, under the circumstances of the particular case, the complainant has used such diligence in exhibiting his demand as the nature of the case required, and if it could be granted without injury to the rights of persons who may be thereby injured in consequence of the delay; and equitable right will be barred by such acquiescence as, if those equities were enforced, would injuriously affect the interests or rights or equities of third persons. *Etting v. Marx*, §§ 322-26.

§ 314. The negligence of public officers cannot create laches on the part of the government, except as to innocent third persons. Time does not run against the government, especially where the terms of the obligation are clear and the evidence has not been lost. *United States v. City of Alexandria*, §§ 327-29.

[NOTES. — See §§ 330-397.]

GODDEN v. KIMMELL.

(9 Otto, 201-212. 1878.)

APPEAL from the Supreme Court of the District of Columbia.

§ 315. *Limitation in equity; lapse of time; stale claim.*

Opinion by MR. JUSTICE CLIFFORD.

Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forums as a means of promoting uniformity of decision.

Stale claims are never favored in equity, and where gross laches is shown and unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the statute of limitations, as a presumptive bar to the claim. *Stearns v. Page*, 7 How., 819; *Badger v. Badger*, 2 Cliff., 154.

Time, it is said, is no bar to an established trust, which may be true in cases of concealed fraud, provided the injured party is not guilty of undue laches subsequent to its discovery. Circumstances of the kind form an exception to the rule; but the rule still is, that when a party has been guilty of such laches in prosecuting his equitable remedy as would bar him if his title was solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting titles. *Michaud v. Girod*, 4 How., 561 (Est. or Dec., §§ 381-86).

STATEMENT OF FACTS.—It appears that the complainants are, or claim to be, creditors of Edwin Walker, deceased, and that they instituted the present suit in behalf of themselves and other creditors of the deceased to recover a moiety of certain real and personal property, together with the rents and profits of the same, which, as they allege, belonged to their creditor in his life-time and at the time of his decease. They allege that their creditor owned and held the property described in the bill of complaint in common with one Abram F. Kimmell, of the city of Washington, since deceased, with whom he was carrying on the livery-stable business under the firm name of Walker & Kimmell, the said property being used for the purposes of said business; that the said Walker being largely indebted to the complainants, their testators and intestates, as well as other parties, dissolved partnership with said Kimmell and conveyed all his real and personal estate, after payment of all partnership debts, to one Voltaire Willett, by deed dated October 8, 1857, in trust to pay off the complainants, their testators and intestates, with the proceeds thereof, the remainder to be paid over to the grantor, his heirs and assigns. Possession of the property at the time was in the junior partner; and the complainants allege that he continued in the possession thereof up to the day of his death, holding the same and applying the proceeds thereof to his own use without accounting for the rents and profits, either to the grantor, the trustee or to the creditors, and that since his death the property has been in the possession of his widow and children, who have appropriated the same to their own use, and that they utterly deny all right of the complainants to any part or interest in the same.

Sufficient appears from the preceding statement to show what the circumstances were on the 1st day of February, 1871, when the present bill of complaint was filed against the respondents in the subordinate court. They are Mary A. Kimmell, administratrix of Adam F. Kimmell, deceased, his four children, the heirs of the deceased trustee, and the administrator of the deceased senior partner, who, as alleged, was the debtor of the complainants.

Service was made; and the respondents appeared and filed answers, setting up several defenses, the most material of which are contained in the answer of the widow and children of the deceased junior partner. They deny all the material allegations of the bill of complaint, to the effect following:

1. That the complainants or either of them are creditors of the deceased senior partner of the firm, or that the senior partner of the firm was ever the owner of the real estate described in the bill of complaint, or that he ever owned or possessed any personal property, or that the deceased junior partner ever had in his possession any personal property which belonged either to the deceased senior partner or to the firm.

2. They admit the death of the trustee, but they aver that they are not informed and cannot state whether he ever did anything in discharge of the trusts created by the said deed, and they also admit that the trustee and the deceased junior partner made the alleged conveyance to the brother-in-law of the latter, but they aver that it was made in good faith, and that the moiety of the consideration belonging to the senior partner was appropriated to pay his just debt, as fully explained in the answer.

3. They also allege as a defense that the debtor of the complainants left Washington in the year 1846; that he went to Richmond and entered into business there with a new partner; that he there contracted large debts for which he was liable; that in the latter part of 1857 he conveyed to his new

partner a large amount of real and personal property to pay all his debts, including those set up by the complainants; that all these claims were fully satisfied and extinguished either by payment in money or by the acceptance of other securities; and that the supposed debtor of the complainants, at the time of the dissolution of the partnership here, before he went to Richmond, relinquished all interest in the future earnings of the concern, and that the partnership as between the parties was dissolved, though they admit that no formal notice of the dissolution was published.

4. They also admit that besides the real estate there was at the time on hand a large stock of horses, vehicles, and other property, all of which was taken by the junior partner; but they aver that the junior partner from time to time made payments and advances to the retired partner exceeding in amount the value of his interest in the assets of the partnership, as estimated by himself; and they aver that no formal statement of accounts ever took place, but they allege that if one could be made, which, as they state, it would be difficult and expensive to accomplish, it would be found that the estate of the debtor of the complainants is largely indebted to the estate of the junior partner.

Finally, they set up as defense to the suit that the claims are stale demands, and of a character that courts of equity will not countenance, because, as they allege, it would now be inequitable and unjust that the complainants should be permitted to enforce an account from the respondents, after having slept upon their rights, if any they have, for so long a time and until all the parties to the transaction are dead.

By consent the cause was referred to an auditor, with instructions to ascertain and report what amount, if any, was due to the respective complainants, and to ascertain and state the partnership accounts and the character of the partnership property at the date of the trust-deed, and the disposition made of the rents and profits by the respondents. Hearing was had before the auditor, and he made the report set forth in the transcript.

Testimony was taken by the complainants prior to the order of reference, and they took further testimony before the examiner subsequent to the appointment of the auditor. By his report it appears that two schedules were attached to the deed of trust, one of which purported to be a list of drafts, notes and bonds due to a third person, and the other to be a list of debts due by the debtor to the complainants. Among other things, the deed recited that the said debtor, independently of his indebtedness to the firm of which he was a member, owed a large amount to the persons named in the two schedules, and that he desired, after paying all the firm debts, to secure *pro rata* the debts in the first schedule, and if sufficient was left after that, to pay in full the debts in the second schedule.

It appears that the deed was duly executed, and that the grantor conveyed to the trustees, his heirs, executors, administrators and assigns forever, all of his right, title and interest in and to the real and personal property, debts, effects, credits and assets of every kind whatever and in any manner belonging to the firm, subject to the debts and liabilities of the firm and to the right of the junior partner in winding up and paying off the same, the true intent and meaning of the instrument being only to convey the interest of the senior partner after all the liabilities of the firm have been discharged. Matters of the kind being fully explained, the auditor proceeds to report that he has not stated the claims of the respective complainants; and he gives the reasons for

the omission, which appear to be satisfactory, as the report shows that the complainants did not furnish the means to enable him to comply with that direction, except perhaps in the single instance fully set forth in the report.

Directions were also given by the decretal order that the auditor should state the partnership accounts, which he also failed to do, for the satisfactory reason, as he states, that no testimony or other material was furnished by the parties to enable him to perform the required service. Another direction of the decretal order was to state the amount of the property belonging to the firm at the date of the trust-deed. For a compliance with that order, so far as the real estate is concerned, the auditor refers to the deeds introduced in evidence before the examiner, and in respect to the personal property he states that there was no evidence given to show what, if any, belonged to the partnership at that date.

Lots numbered 16, 17, and the west half of 18, in the square numbered 491, were included in the trust-deed. On the 16th of November, 1858, the junior partner and his wife, the trustee of the senior partner joining with them, conveyed the west half of lot 18 and part of lot 17 to the trustee of the sister-in-law of the first-named grantor, in respect to which the auditor reports that the deed conveying the same refers to the prior deed of trust given by the senior partner, and he states that the recitals of the deed specify the purpose for which it was executed, and show that the firm owed the *cestui que trust* the sum of \$2,000 money loaned, and that the property was conveyed to her for the sum of \$5,000, one-half of which went to pay that debt and interest, and the other moiety was paid or secured to the junior partner of the firm.

Six years later the grantee in the deed reconveyed the same to her brother-in-law for \$5, as expressed in the consideration of the deed. Complainants charge in the bill of complaint that the junior partner fraudulently procured the conveyance to be made in order to secure the title to himself; but the respondents in their answer deny all fraud and bad faith in the premises, and the auditor reports that no testimony was given touching the conveyance. Instead of that, he states, in response to that charge, that while the circumstances attending the conveyance may be well calculated to cast suspicion upon it, he finds nothing in the case to warrant him in pronouncing it fraudulent and void.

§ 316. *Answer as evidence in favor of respondent.*

Where the answer of the respondent is responsive to the bill it is evidence in his favor, and is conclusive, unless disproved by more than one witness. Story, Eq. Plead. (7th ed.), sec. 875a; *Daniel v. Mitchel*, 1 Story, 188.

Two witnesses, or one witness with confirmatory circumstances, are required to outweigh an answer asserting a fact responsive to the bill, the reason for the rule being that when the complainant calls upon the respondent to answer an allegation he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness; and as the complainant cannot prevail unless the balance of proof is in his favor, he must have circumstances in addition to his single witness, else he fails to establish the affirmative of the issue. *Clark v. Van Reimsdyk*, 9 Cranch, 153; *Hughes v. Blake*, 6 Wheat., 453.

Chancery courts invariably hold, where the answer is responsive to the bill and positively denies the matters charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor; and unless it is overcome by the testimony of two credible wit-

nesses, or of one witness corroborated by other facts and circumstances which give it greater weight than the answer, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill. *Badger v. Badger, supra.*

Only one witness was examined before the auditor as to the rents and profits received by the respondents, and the report of the auditor states that the annual rental value of the property, excluding that charged to have been fraudulently conveyed, was only \$938, and if that be excluded, then the real estate consists only of lot 16 in square 491, with the improvements.

Ten exceptions to the auditor's report were filed by the complainants, alleging for error that he did not report their respective claims as liens against the property in controversy. Pursuant to the order of the court, the parties were heard upon the auditor's report and the exceptions thereto, and the court entered a decree that the bill of complaint be dismissed, from which decree the complainants appealed to the general term, where the decree of the subordinate court was affirmed.

Proceedings in the court below being ended, the complainants appealed to this court, and filed the following assignment of errors: 1. That the court erred in not entering a decree canceling and setting aside as fraudulent the said conveyance to the sister-in-law of the junior partner. 2. That the court erred in not entering a decree that the real estate transferred to the trustee of their debtor should be sold and distributed to his creditors. 3. That the court erred in not entering a decree that the administratrix of the junior partner should account and pay to the trustee to be duly appointed so much of the personal assets of the firm included in the trust-deed as were held by her intestate in his life-time. 4. That the court erred in dismissing the bill of complaint. 5. That the court erred in not entering a decree that the representatives of the deceased junior partner should account for the rents and profits of the real estate conveyed to the trustee up to the date of the decree in this cause.

That the partnership existed is not denied; and the proof is clear that the senior partner left Washington in 1846, and that he went to Richmond and there formed a new partnership, and engaged largely in business for twenty years before his death. As before remarked, the right of the complainants, if any, to prosecute the suit sprang from the trust-deed dated October 8, 1857, and executed by their alleged debtor to his trustee for the purpose of paying his debts, including what he owed to the complainants. Annexed as the deed is to the bill of complaint, it may properly be referred to as an exhibit, from which it appears that their debtor and the intestate of the first-named respondent were "engaged as partners in the city of Washington, and in the progress of the business acquired real and personal estate, including horses, carriages, buggies, sulkies, and other property," and that they held claims against various persons, and that the senior partner was independently indebted to the persons named in the schedules appended to the deed; that he conveyed all his right, title and interest in the real and personal property, debts, effects, credits and assets of the firm to the grantee of the trust-deed for the described purposes, subject to the debts and liabilities of the firm, and the right of the junior partner in winding up and paying off the same.

There is no averment in the bill that any interest in the partnership property was ever collected by the trustee, or that he could have made any such collection, nor is it averred that any of the complainants are judgment creditors.

Fourteen years elapsed from the date of the deed to the filing of the bill, and throughout that period none of the complainants during the life-time of the partners and trustee, or any of them, took any step whatever to ascertain or enforce their rights, if any they had, under that trust-deed. Nothing appears to show that the trustee ever took any beneficial title whatever to the real property. Beyond doubt he took the legal title by the words of the deed; but there is no proof to show that he ever acquired the possession or the right of possession, it appearing by the deed that the right of possession was secured to the junior partner for the purpose of winding up the partnership.

Concede that the grantor might have joined the trustee in a suit for an account on his own motion or at the suggestion of the trustee or creditors, still the answer to that suggestion, if made, is that he did not do so; and now the grantee, the trustee and the junior partner all being dead, unless there can first be an account of the partnership property, the complainants can obtain no relief, as there is nothing on which a decree in their favor could operate for their benefit. They do not allege that there was ever any settlement of the partnership affairs, nor do they in terms pray in the bill for an account of the partnership assets. By consent an auditor was appointed to ascertain and state the partnership accounts, but he characterizes the proceedings in the cause as involved in obscurity, and the testimony "as incomplete, vague and indefinite," and reports that there is only one instance in which the amount due to any one of the complainants has been proven with any reasonable degree of certainty. Except the prayer that the administratrix and heirs of the junior partner account with and pay over to the complainants the rents and profits of the estate conveyed to the trustee, the bill of complaint contains nothing which can possibly be construed as a prayer for an account of the assets of the partnership.

Four lots, to wit, 16, 17, 18 and 19, the complainants claim were held and used as partnership property; but the answer of the principal respondents denies that claim, and avers that the firm never owned any of the real estate mentioned, except lot 16 and parts of lots 17 and 18; and the auditor reports that, excluding the property conveyed to the other trustee, the assets consist only of lot 16 with the improvements on the same, and there is not a particle of testimony to prove that the conveyance to the other trustee was fraudulent. Attempt is made to set aside that conveyance without making either the trustee or *cestui que trust* parties to the bill, though it is said by the complainants that they are both alive, of which, however, there is no proof in the record.

Exceptions to the auditor's report were taken by the complainants because he did not report as liens against the property described in the cause the claims of each and every complainant, when his report shows that the evidence given did not enable him, except in one instance, to ascertain the amount of the claims, which was much less than the minimum of jurisdiction.

For fourteen years the complainants slept upon their rights, and there is not a single allegation in the bill nor a particle of proof introduced in their behalf to excuse their manifest laches in not seeking an account until all the parties in interest have departed this life.

§ 317. *Limitation in equity by analogy to the statute.*

Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statutes of limitation which govern courts of law in like cases,

and this rather in obedience to the statute of limitations than by analogy. *Wagner v. Baird*, 7 How., 234. In many other cases they act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate. *Moore v. Greene*, 2 Curt., 202; 2 Story, Eq. Jur. (8th ed.), 520; *Farnum v. Brooke*, 9 Pick. (Mass.), 243.

§ 318. *Stale claims are not sustained by courts of equity.*

Support to those propositions is found everywhere; but there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. Such courts in such cases often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Badger v. Badger*, *supra*; *Roberts v. Tunstall*, 4 Hare, 269; *Stearns v. Page*, *supra*.

Authorities to support that proposition are numerous and decisive, nor is it necessary to look beyond the decisions of this court for the purpose. Lapse of time, said Mr. Justice Thompson, and the death of the parties to the deed have always been considered in a court of chancery entitled to great weight and almost controlling circumstances in cases where the controversy grows out of stale transactions. *Jenkins v. Pye*, 12 Pet., 241 (FRAUD, §§ 373-75); *Beckford v. Wade*, 17 Ves., 96; *Humbert v. Rector*, 7 Paige (N. Y.), 193.

Few cases can be found more nearly analogous to the case before the court than the one in which the controversy had its origin in this district. It had respect to a deed of trust executed to secure certain creditors named in the schedule annexed to the deed. Enough appears to show that the deed was filed by the trustee himself within twenty years and that the subordinate court decreed that the amount of debts enumerated in the schedule should be paid. Appeal from that decree was taken to this court, and Mr. Chief Justice Taney, in disposing of the case and reversing the decree, remarked as follows: "We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the statute of limitations, courts of equity refuse to interfere after considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost." *McKnight v. Taylor*, 1 How., 168.

Corresponding views were expressed by Mr. Justice Story prior to that time, and the chief justice referred to the same as having settled the doctrine of the court upon the subject. *Piatt v. Vattier*, 9 Pet., 416 (§§ 735-36, *infra*); *Smith v. Clay*, Amb., 645.

Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill

specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights. *Badger v. Badger*, 2 Wall., 87 (§§ 403-4, *infra*); *White v. Parnter*, 1 Knapp, C. C., 227.

When a party appeals to the conscience of the chancellor in support of a claim, says Mr. Justice Field, where there has been laches in prosecuting it or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the statute of limitations contained in the answer. *Marsh v. Whitmore*, 21 Wall., 185.

Laches and neglect; says Mr. Justice Swayne, are invariably discountenanced in equity, and therefore there has always been a limitation of suits in such courts from the beginning of their jurisdiction. Limitations of the kind are dictated by experience and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof. *Brown v. County of Buena Vista*, 95 U. S., 161.

Difficulties often arise in controversies of the kind in getting at the truth so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the case, and it is not improbable that many or all of their clerks and agents may be inaccessible as witnesses, for the same or some other reason, or if alive and their attendance as witnesses may be secured, they may not be able to remember anything about the transactions.

Viewed in the light of these authorities and suggestions, the court is of the opinion that the last defense set up in the respondents' answer is fully maintained, and that there is no error in the record.

Decree affirmed.

HUME v. BEALE.

(17 Wallace, 336-351. 1872.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Mr. Berry, in 1826, made a deed conveying to Beale certain lands and other property in Maryland in trust for the benefit of his daughter-in-law, a widow, and her three daughters, the trust to terminate on the marriage of the widow or when one of the daughters reached her majority. Mr. Berry died in 1827 and the property was much wasted by his widow. About the year 1832 the three children commenced an action by their uncle, in a county court of Maryland having equity powers, to charge Beale with waste, and it was decided that he was not guilty of a breach of trust, and this result seemed to have been acquiesced in by the complainants. In 1834 the property was sold by a decree of the court, and the share of the youngest daughter, Rosalie, was left in Beale's charge. In 1839 Mrs. Hume, one of the daughters, and complainant in this action, reached her majority. In 1860 Rosalie died. In 1866 Beale, the trustee, died. In 1867 the two surviving daughters, then widows, filed a bill against the executrix of Beale, seeking to

hold his estate liable for alleged waste before 1830. Mrs. Hume testified that in 1834 or 1835 her husband proposed suing Beale, but she dissuaded him from so doing. The bill was dismissed in the lower court.

Opinion by MR. JUSTICE DAVIS.

It is undeniable that the waste and misappropriation of property for which relief is sought occurred prior to 1830. This is apparent, not only by the testimony of the living witnesses, but by the papers in the suit commenced in the county court of Prince George's county, Maryland, where the property was situated, in behalf of the children, for whom Benjamin Berry, in his deed, made provision, by their uncle and next friend, for the same cause of action as that comprised in the present suit.

§ 319. *A decision of the same question, when the cause of action was recent, forty years ago, if not strictly an adjudication of the matter, may be looked to as leading to a proper conclusion.*

While it is not necessary for the purposes of this case to decide whether this decree can be treated as a former adjudication of the matters in controversy, yet it is quite clear that forty years ago a Maryland court of equity, sitting on the spot where the transactions occurred, while they were fresh in the memory of men, did not believe Beale guilty of the breach of trust with which he was charged, and that the near kindred of the complainants acquiesced in the result of that suit.

§ 320. *Where there has been gross neglect and laches in seeking relief, it is immaterial whether the trustee held a naked legal estate or had actual power.*

Whether Beale, under the deed of Benjamin Berry, was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further, it is not important to determine. In any aspect of the case, there has been such gross laches on the part of the *cestuis que trust* that they have disentitled themselves to the relief which they seek to obtain. It is an established rule with courts of equity, independent of any statute limiting the time in which suits can be brought, that they will not entertain stale demands. This rule is necessary from considerations of public policy, and because it is impossible to do entire justice when the transactions sought to be impeached have become obscure by lapse of time, and the evidence on the subject is liable to be lost. Story, referring to the rule imposing diligence upon parties seeking relief, says: "Hence, if there be a clear breach of trust by a trustee, yet if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose." Eq. Juris., § 1284.

This rule, requiring the party injured to seek redress in reasonable time, has so often received the sanction of courts of equity in this country and England, that it is unnecessary to cite authorities to sustain it. Whether the lapse of time is sufficient to bar a recovery must, of necessity, depend upon the particular circumstances of each case. *Harwood v. Railroad Co.*, 17 Wall., 78.

By the terms of the deed in this case the interest of Mrs. Berry in the property terminated on her marriage or death, and if the eldest child was of age or married, on the happening of either of these events the entire trust ceased, and the trustee was directed to convey the estate, real and personal, to the children and their heirs. It is alleged that Mrs. Berry was married to Owings in 1830. If this were so, it would account for her conduct in converting the

personal property to her use, but the evidence on the subject of this marriage, although rendering it highly probable that it did occur, is insufficient to establish it.

It is conceded, however, that she was married to Ferguson in 1843, at which time the eldest child was not only of full age, but had been married and was then a widow. These occurrences, according to the terms of the deed, terminated the trust, but in point of fact it was terminated in 1834 or 1836, when the real estate was sold by order of the Prince George's county court. This sale is set up in the answer, and Mrs. Hume testifies that the farm was sold by commissioners appointed by the court, and that her husband, in 1836, received from them in person her share of the proceeds. It is in evidence that Mrs. Crosby was married in 1844, and she must have arrived at full age before that time.

§ 321. *Long acquiescence, with knowledge, in the misconduct of a trustee, will bar a cestui que trust's remedy.*

It thus appears that all grounds of action existing in this case must have occurred between twenty and thirty years ago, and that the alleged breach of trust for which the estate of Beale is asked to account took place thirty-seven years before the institution of this suit. Why have these complainants slept upon their rights for this great length of time, and why have they delayed invoking the aid of a court of equity until the person charged with misconduct is dead? It is plain this unusual delay places them on the defensive, and requires satisfactory explanation before they can obtain relief.

It is alleged in the bill as an excuse for not suing earlier that Beale put the complainants off from time to time with promises to settle his trusteeship, and did not deny that he was largely indebted to them on that account. This allegation receives support only in the testimony of Mrs. Hume, who had no right to testify as to any conversation or transaction with the decedent unless the opposite party or the court wished her to do it. 15 Stat. at Large, 533. This rule of exclusion was imposed by congress in the interest of dead men's estates, but as the record does not disclose any objection to the competency of the witness her testimony will be treated as if rightfully given. She says, in general terms, that she called on Beale repeatedly to settle, and that he promised to do so, and that these promises induced her not to sue him. This is the extent of her testimony on the subject, and her statement is so general and so obviously necessary to avoid the bar of the statute of limitations and of lapse of time, which were pleaded, that it carries little weight with it. It would never do to hold that a stale demand of such long standing could have vitality imparted to it on the mere statement of a party in interest that the decedent promised to settle. There must be some corroborating circumstances to call into activity the powers of a court of equity, and these are wholly wanting in this case. No one was ever present at any of these conversations, and there is no specification of time or place, nor does she say that Beale ever admitted any indebtedness on account of this trust. Besides, she never wrote to him, nor did he ever write to her, on the subject, which is a little remarkable, considering her destitute situation from 1837 to the commencement of this suit. Indeed, the letters which she did write to him in 1837 and 1846 are inconsistent with the idea that she thought he intended to defraud her, which she now says she always entertained.

There is nothing in the record except this testimony that tends even to show that Beale ever admitted he was chargeable for the wrongful conversion of the

property in question. He expressly disclaims this liability in the Maryland suit in 1830, and the court could not have rendered the decree it did without being satisfied at least that he was not personally concerned in the waste of the property. It is hard to believe, on the unsupported testimony of a party in interest, that Beale at different times during a long life confessed a liability which he repudiated on the occasion of that litigation..

It is a little singular that Beale should have confined his promises to Mrs. Hume, and not extended them to Mrs. Crosby. Mrs. Crosby does not testify, and we do not learn that either herself or husband, with whom she lived for thirteen years, ever manifested disapprobation of Beale's conduct. If the other sister, Rosalie, who died unmarried in 1860, considered Beale had wronged her, she would not have intrusted him, as she did, with the management of her share of the money received from the sale of the farm.

There is one other point in connection with the testimony of Mrs. Hume worthy of comment. She swears that, in 1834 or 1835, she advised her husband against suing Beale, for the reason that he was poor and nothing could be made out of him, and that her husband used to lend Beale money and supersede his debts for him. If this be so, the theory on which this case is prosecuted falls to the ground, for the whole effort is to show that Beale got so rich immediately after the conversion of the personal estate that he must have shared the proceeds. It is argued that the conversations which Beale had with Douglass refer to the obligations arising from his breach of trust, and that therefore Mrs. Hume is sustained by the testimony of Douglass. But manifestly Beale is not talking on this subject; he is talking about the sum of \$3,000 which Miss Rosalie Berry got from the sale of the farm and placed in his hands to loan. This money he owed the estate of Miss Berry, and was desirous of paying to her next of kin, Mrs. Hume and Mrs. Crosby.

It is needless to pursue the subject further. If Beale was guilty of misconduct in his character of trustee, the complainants had full knowledge of it and acquiesced in it for a great length of time, and there is nothing shown in the evidence to overcome the decisive influence of this knowledge and acquiescence.

Decree affirmed.

ETTING v. MARX.

(Circuit Court for Virginia: 4 Federal Reporter, 673-687; 4 Hughes, 812-826. 1880.)

STATEMENT OF FACTS.—Samuel Marx died in 1860. By his will he devised part of his estate to his executors, in trust for the use of certain devisees, one of whom was the plaintiff, then a *feme covert*. Frederick Marx was the only executor who qualified, in 1860, and as such he invested certain parts of the trust funds, in 1864, in Confederate bonds. Later, in 1864, Marx turned over to Edward Mayo, who qualified as trustee, all the property in his possession, and ceased to act as trustee thereafter. In 1869 Frank M. Etting was substituted as trustee for the complainant, on her prayer, and thereafter Mayo turned over to him all the securities held for her, which were all received except the Confederate bonds, but certain correspondence, given in evidence on the part of Etting, the trustee, showed that he and Mrs. Etting did not pretend to hold Marx liable for the bonds. The complainant became *sui juris* in 1870, and Marx died in 1877, leaving debts to the amount of \$5,200, which had been contracted since he ceased to act as trustee, and which would be valueless if his estate were held liable. Suit was brought in 1877, by Harriet

M. Etting, to recover from Marx's estate the value of the bonds. The defense relied on was the statute of limitations, lapse of time, and the acquiescence of the complainant.

Opinion by HUGHES, J.

There is little to be considered in this case except the liability of the estate of Frederick Marx for the scaled value of the Confederate money, which, in 1864, or chiefly in that year, he invested in Confederate bonds. No one disputes that these bonds were an illegal object of investment. All investments in them have been irrevocably decided to be void, as having been made "in aid of the rebellion."

It is not charged, however, that there was, on the part of the deceased trustee, any fraudulent motive or intention, moral or political, in making the investments. There is no element or charge of fraud, actual or constructive, in the present case, and so the only question is one of liability for a well-intended but illegal act. Nor can it be denied that the estate is liable for these investments unless it has been absolved by the bar of the *statutes of limitations*, or by the *laches* of the complainant and petitioners in this suit, or by their *acquiescence* so long as to render the enforcement of their demands, at this late day, derogatory to the rights, interests or equities of others, which have resulted from that protracted acquiescence.

§ 322. *How far courts of equity are bound by the statute of limitations or governed by its analogies.*

As to the statutes of limitations I do not think they affect this case, either directly or by analogy. In general equity merely follows the analogies of the law in respect to limitations. A court of equity is *bound* to apply the statute only in cases where the courts of law and equity would have concurrent jurisdiction; that is to say, where the complainant might have gone into a court of law with his cause instead of coming into chancery. "In such cases courts of equity consider themselves within the spirit of the statute and act in obedience to it; but, in the consideration of purely equitable rights and titles, they act in analogy to the statute, but are not bound by it." *Hall v. Russell*, 3 Saw., 515. "In all cases of concurrent jurisdiction, at law and in equity, statutes of limitations seem equally obligatory in each court; and courts of equity do not act so much in analogy to the statutes as in obedience to them." 2 Story's Eq. Jur., 1520. In a great variety of other cases, however, courts of equity act only upon the *analogy* of the limitations at law, and not in *obedience* to the statutes. A leading and very instructive case on this subject is *Havenden v. Lord Annesley*, 2 Sch. & Lef., 629 *et seq.*

§ 323. *Action of courts of equity in cases of stale demands, long acquiescence and laches.*

There is also still another class of cases in which equity courts disregard both the statutes of limitations and the principle of analogies, and act on considerations peculiar to themselves; that is to say, "on their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 2 Story's Eq. Jur., 1520.

Thus, to recapitulate, there are three classes of cases with reference to the bar of time — *First*, those in which equity is bound to apply the statutes of limitations; *second*, those in which it merely acts in analogy to those statutes;

and, *third*, those in which it is neither bound by nor acts upon the principle of analogy to them, but proceeds on doctrines peculiar to and inherent in itself.

§ 324. *Exclusive jurisdiction of courts of equity over cases between trustee and cestui que trust.*

The present is not a case of the first class. It is not a case in which the jurisdiction of law and equity is concurrent, and in which the complainants might have gone into one court or the other at option. It is a suit between *cestuis que trust* and a trustee; a case within the exclusive jurisdiction of equity; for, though the law courts have jurisdiction in a few cases of the simpler trusts, yet, in general, equity has exclusive jurisdiction over trusts. "Estates vested in persons upon particular trusts and confidences are wholly without cognizance at common law, and the abuses of such trusts and confidences are beyond the reach of any legal process." 1 Story's Eq. Jur., 29.

It is elementary law that trusts are exclusively within the cognizance of equity. The present is not, therefore, a case of concurrent jurisdiction of law and equity, and is not one in which I am *bound* by the statutes of limitations. Many, and indeed most, of the suits in chancery, in which the trustee and *cestui que trust* are parties on one side, and others are parties in adverse interest on the other, rank in the first class of cases that have been mentioned, where equity is bound by the statutes of limitations. An instance of such cases was that of *Livesay v. Holms*, 14 Gratt., 441. A widow had qualified as administratrix of her husband and taken possession of and held slaves, in which she claimed a life estate under her father's will. She was afterwards removed from her office of administratrix, but continued to hold the slaves for more than five years after such removal. *Held*, that the statute of limitations will protect her against any claim by the administrator *d. b. n.*, and next of kin of her husband, and that the fact that one of the next of kin had been a married woman during the whole period will not prevent the running of the statute against her. This was a suit in equity, but might have been brought at law.

Nor do I think the case at bar falls within the second class of cases that have been described,—those in which courts of equity follow the analogies of limitation enforced at law. Those are cases in which, though cognizable exclusively in equity, the reason of the law of limitation applies as cogently as in suits at law. The instances of this class mentioned by Judge Story are suits for real estate, where there has been adverse possession for twenty years, brought, say, by a mortgagee; and suits brought to subject real estate to the liens of judgments, where there has been no effort to enforce the judgments for twenty years. The mere fact that equity has jurisdiction to foreclose a mortgage or enforce the lien of a judgment upon real estate is held not to affect the reason of the law of limitations which bars actions at law after certain periods of time. It cannot be pretended that the present suit falls within that class of cases.

§ 325. *As between trustee and cestui que trust the lapse of time, direct or by analogy, has no operation, but courts of equity will not relieve where there has been long acquiescence or gross laches, or the demand has grown stale. Cases cited.*

I conclude that it falls within the third class, to wit, that in which equity, wholly ignoring the statutes of limitations by which the law arbitrarily bars actions after periods of time arbitrarily fixed, assumes the untrammelled prerogative of deciding, upon the circumstances of the particular case before it,

whether the complainant has used such diligence in exhibiting his demand as the nature of the case required; and whether, in giving him relief after such delay as has occurred, the court can be certain not only of his right to it, but also that it can be granted without injury to the rights of persons who may be thereby injured in consequence of the delay.

A review of the cases of this latter class which have been decided by courts of equity will reveal a great elasticity in the period which has been held sufficient to disentitle complainants from recovering their demands. In regard to fraud, though it is settled that no lapse of time will bar so long as it is concealed, and that neither the statute nor the principle of analogy will begin to run except from the time the fraud is unkenneled, yet it is equally settled that if there be laches or acquiescence, and unreasonable delay after that event, equity will then apply its usual principles in determining whether or not to grant the relief demanded. It is equally a rule that, as between a trustee and his *cestui que trust*, neither the statute, nor the rule of analogy, nor lapse of time, will, in general, affect the right of the beneficiary to redress; yet equity will in such cases, when the circumstances require it, enforce against the *cestui que trust*, especially where the rights of third persons are concerned, its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*; and while there are cases of this class where equity has granted relief after a great length of time, even fifty years, yet there are others in which it has refused it after only a few months.

Among the cases which have been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are (1) those in which the public convenience requires that there shall be a speedy end of strife; (2) others in which some of the principal parties, in transactions sought to be reviewed, are dead and their vouchers lost; (3) others in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; (4) others, where the disturbance of purchases or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons. The following are the more important of the cases, falling within the classes which have been named, which have been cited at bar. In *Bryan v. Weems*, 29 Ala., 423, it was held that the statute of limitations barred a trustee who had neglected to sue for slaves held subject to a trust during the period of statutory limitation; and that the rights of the *cestui que trust* were also barred. In *Flanders v. Flanders*, 23 Ga., 249, which was a suit by the widow of an intestate and a married daughter and husband to set aside the sale of a slave by the administrator alleged to have been made to himself, more than ten years after the sale was made, it was held to have been brought too late, the widow having been ten years *sui juris*, and the daughter four years through marriage; the delay being unreasonable.

In *Hough v. Coughlan*, 41 Ill., 131, there had been a contract by bond for the conveyance of land, and after twelve years a bill was brought for specific performance, and the court held that there had been unreasonable delay: "That great delay of either party unexplained, in not performing the terms of a contract, or in not prosecuting his rights under it by filing a bill, or in not prosecuting his suit with diligence when instituted, constituted such *laches* as would forbid the interference of a court of equity."

In *Mitchell v. Berry*, 1 Met. (Ky.), 619, it was held, where a *cestui que trust* desires to avoid a sale of his estate, at which the trustee has become the purchaser, he must apply to chancery in a reasonable time after he had knowl-

edge of the facts which impeach the sale, or he will be presumed to have acquiesced, and that reasonable time depends upon the circumstances of the case, and the discretion of the court. In the particular case before the court an acquiescence of twelve years was held sufficient to disable the parties from coming into a court of equity.

In *Davison v. Jersey Co.*, 71 N. Y., 333, there had been a contract for building houses by May 1, 1859, and for purchase and deeds. Suit was brought for specific performance in 1864, and it was held that the rights of complainant were, under the circumstances of that case, forfeited by *laches*.

In *The State v. West*, 68 Mo., 229, the testator of defendants, having bought certain land in his own name at a sale made by order of the county court, on the 23d day of April, 1873, to satisfy a school mortgage, on the 20th day of September, 1873, resold it at an advance, and on the 2d day of January, 1874, died. The county court knew of the purchase by the deceased soon after it was made. On the 18th day of June, 1874, fifteen months after the purchase, the county court brought suit to recover of defendants the profits made by deceased on the resale, claiming that he was acting as agent of the county; but the court held that if the county ever had a cause of action, it had been guilty of such *laches* as made it doubtful if this suit could be maintained. The court say: "Under such circumstances, the *laches* must, of itself, be held fatal, for it would be to assert a doctrine to the last degree hazardous to say that a complainant, with full knowledge of all the facts on which he relies, can lie quietly until death comes to his assistance, and puts a seal of perpetual silence upon the lips of his adversary."

In *Atkinson v. Robinson*, 9 Leigh, 393, it was held that every claimant who asks relief of equity ought to exhibit his claim within a reasonable time, so that in giving him a decree the court may not do injustice to the defendant.

In *Robertson v. Read*, 17 Grat., 544, where there had been a settlement between partners in 1819, and transactions in pursuance of the settlement in 1820, and in subsequent years down to 1831, and suit was brought in 1834 for an account, and claiming money by the administrator of one of the partners who had died, against the other partners who were living, it was held that a claim, probably just originally, must be rejected and disallowed in consequence of its staleness, and of the probable impossibility, from the lapse of time and the death of parties, of ascertaining the facts of the case and doing justice, and also because it might reasonably be presumed that the said claim had been abandoned or satisfied.

In *Harrison v. Gibson*, 23 Grat., 212, it was held that if from the delay which has taken place no correct account can be taken between the parties to the action, and the transactions of parties have become obscured by death of some of them; and if, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

In *Hudson v. Hudson*, 3 Rand., 117, where a bill for an account had been filed in 1810 for the settlement of transactions of a deceased person's executors, under a will under which they had qualified in 1789, and had been dismissed by the chancellor on the merits, it was held that any subsequent suit would not be entertained, and that the court would presume, from the long acquiescence of all parties in the action of the executors, that the estate had been finally and properly settled.

In *McKnight v. Taylor*, 1 How., 161, it was held by the supreme court of the

United States, that, in matters of account not barred by the statute of limitations, courts of equity may refuse to interfere after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice, where the original transactions have become obscure by time, and the evidence may be lost.

In *Badger v. Badger*, 2 Wall., 89 (§§ 403-4, *infra*), the same court, in holding that, except in certain cases, courts of equity will, acting on their inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish state trusts, remarked at page 94: "There is a defense, peculiar to courts of equity, founded upon the lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases . . . courts of equity refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." Important learning on the general subject may also be found in *Brown v. Brown*, 95 U. S., 161; *Goddin v. Kimmell*, 99 U. S., 211; and *Wood v. Carpenter*, 101 U. S., 235.

The case at bar, if it falls within any class of cases which have been described, and of which examples have been cited in the foregoing review, falls within that alluded to in the case of *Badger v. Badger*, last cited, where the long acquiescence of the parties claiming rights, in the action of those against whom they claim, has created a presumption that they have abandoned their rights, and where the enforcement of those rights now would produce hardship and injustice to third persons.

Perry says (see 2 Trusts, § 870): "Acquiescence in a transaction may bar a party of his relief in a very short time. If one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done." He cites the English cases of *Kent v. Jackson*, 14 Beavan, 384; *Styles v. Guy*, 1 Hall & Twells, 523; and *Ex parte Morgan*, 1 Hall & Twells, 328, which I have not been able to consult.

In the case of *Graham v. Railroad Co.*, 2 McN. & G., 156, 158, Lord Cottenham, refusing relief after an acquiescence of only eighteen months, said that the question was whether the equity set up by the complainant was not counteracted by a counter equity on the other side; "for in many cases the interposition of the court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get in that state which makes the injunction asked for not only a proceeding not enforcing an equity, but calculated to inflict great hardship and injustice." And in another place, in the same case, he says: "If those who have the management of the affairs of others depart from the regular course, and there is an acquiescence, the parties interested who have so acquiesced cannot complain."

It being, therefore, a settled doctrine of equity jurisprudence that men may bar themselves of equitable rights by such acquiescence, as, if those equities were enforced, would injuriously affect the interests or rights or equities of third persons, it is obvious that this acquiescence and its results must be considered by a court of equity with no reference to the arbitrary periods established as bars to suits by statutes of limitations; and, as to such cases,

nothing could be more mistaken than the remark of the dissenting judge in the Missouri case of *The State v. West*, that to apply the doctrine in a case where there was an acquiescence for only fifteen months, as that was, "would be going far beyond any decision ever made in England or America."

This being a recognized doctrine of equity, I have now to inquire whether there was an acquiescence in the action of Frederick Marx, in regard to the Confederate bonds, such as created counter equities which would be overthrown by granting the relief sought by the complainant and petitioners in this cause.

It abundantly appears from the record that to grant this relief would sweep away the whole estate of Frederick Marx, and leave nothing for his creditors at large, whose claims exceed \$5,000. It is claimed in the pleadings, and is doubtless conceded by all the parties to this cause, that Frederick Marx was an honorable man, and would not have contracted debts to so large an amount as \$5,000 if he had not felt assured that no reclamation would be made upon him for his illegal investment in Confederate bonds. But even though he had been capable of incurring these debts in a condition of conscious insolvency, yet, if suit had been brought within a reasonable time after the close of the war, his credit would, most probably, have been so impaired that the present creditors of the estate would not have been apt to trust him to the extent of \$5,000.

I cannot but believe that this large indebtedness to general creditors is the result of the acquiescence of the complainant and petitioners in his illegal investments for a period of twelve years after they could have sued him, and during the whole remainder of his life. By their own neglect to sue they perpetuated his credit with the public, and they threw him off his guard in the contraction of debts. It is very clear that they might have sued as early as the spring of 1866, when the courts of Virginia were reinstated under the Pierpoint government. The stay laws of Virginia, enacted during the war, affected little other than final process for the collection of debts, and sales under decrees and trust-deeds. They forbade no other proceedings in court than trials by jury, and put no restriction whatever upon suits in equity. So, likewise, the stay laws of 1866 and 1867 stayed only the "collection of debts." Suits might be brought for the *establishment* of debts *ad libitum*, in Virginia, from the spring of 1866 to the present time, and their *collection* was stayed no longer than the 1st of January, 1869; eight years and a month before this suit was brought. Suits might have been brought in this court at any time after 1865. Certainly an acquiescence of more than eleven years in the action of this trustee, accompanied by such assurances as those given eight years before death by Frank M. Etting, in his letters of March and July, 1869, which have been quoted, and by results in the form of new debts incurred afterwards to the amount of \$5,000, which are hopeless of payment, if the demands of the complainant and petitioners are allowed, would seem sufficient to bring the case within the doctrine of the loss of equities by acquiescence.

§ 326. *Effect of coverture upon the equitable limitation of stale demands.*

As may be inferred from the foregoing, I do not agree with counsel for complainants in the proposition that Mrs. Etting was barred from suing by coverture, or that the complainants were barred from suing by being otherwise not *sui juris*.

In *Harrison v. Gibson*, 23 Grat., 212, it was held that though a bill by hus-

band and wife in right of the wife is the bill of the husband, and the wife is only joined for conformity, yet the coverture of the wife is not therefore an excuse for delay in bringing suit; and it was also held that though a delay of fourteen years after a right has accrued does not create a statutory bar, it will, in connection with other circumstances, be very persuasive against the justice of the claim, which the court in that instance refused to sustain. I think the bill and petitions must be dismissed. I will so decree.

UNITED STATES v. CITY OF ALEXANDRIA.

(Circuit Court for Virginia: 4 Hughes, 545-553. 1883.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—The cities of Georgetown, Washington and Alexandria united their corporate credit and resources with the United States, Virginia and Maryland in the construction of the Chesapeake and Ohio canal. About the year 1836, they had exhausted themselves in this behalf, and the canal was unfinished. They applied to congress for relief. The form in which this relief should be given was not definitely settled upon in the first instance. But it finally took the form indicated in the "act for the relief of the several corporate cities of the District of Columbia," passed May 20, 1836. 5 Stats. at Large, 32. The act provided that the three cities should convey the legal and equitable title in their stock to the secretary of the treasury to be held in trust for the United States, with power in the secretary of the treasury "at such times, within ten years, as may be most favorable for the sale of the said stock, to dispose thereof at public sale, and reimburse to the United States such sums as may have been paid under the provisions of this act;" and "if any surplus remain after such reimbursement, he shall pay over said surplus to said cities." The plan was that the United States should pay certain debts of the three several cities, incurred on account of the canal, taking in lieu of them the shares they respectively held in the canal company. It was stated in argument at bar that the debts thus paid by the United States in cash amounted to about eighty-five cents in the dollar of the par value of the stock received in exchange.

While this measure was pending before congress, the city of Alexandria brought to the attention of that body, by an elaborately drawn memorial, her embarrassment and urgent need of relief in respect to the Alexandria canal, which was an extension of the Chesapeake and Ohio canal from Georgetown into her own corporate limits.

This memorial was presented in January, 1836. It simply asked relief, and did not suggest any form in which it should be given. In May, the act for the relief of the three cities on account of the Chesapeake and Ohio canal was passed; and in December, 1836, Alexandria filed an additional memorial suggesting that the relief which she separately asked should be in the form in which the three cities had received it in the act of May preceding, in respect to their indebtedness for the main canal. Alexandria's claim for relief in respect to her branch canal rested upon the same equities and considerations of public justice and policy on which that of the three cities had rested in respect to the main work. She then owned thirty-five hundred shares of the stock of the Alexandria Canal Company, though it seems now that she had as yet completed paying for only fifteen hundred shares.

There is nothing to show that congress was informed at this time of the

fact that she had not yet paid up her subscription for part of her shares in the stock of the branch canal and could not deliver them. Congress responded favorably to Alexandria's separate and additional claim to relief in respect to her separate and branch canal. Congress voted \$300,000 out of the treasury to Alexandria, which was almost precisely eighty-five per cent. of the par value of her thirty-five hundred shares. The act by which this payment was authorized was passed on the 3d of March, 1837. See sec. 2 of ch. 44 of the acts of 1836-7; 5 Stats. at Large, 190.

The act provided: "That when the corporate authorities of the town of Alexandria shall deposit the stock held by them in the Alexandria Canal Company in the hands of the secretary of the treasury, with proper and competent instruments and conveyances in law to vest the same in the secretary of the treasury and his successors in office, for and on behalf of the United States, to be held in trust upon the same terms and conditions in all respects as the stock held in the Chesapeake and Ohio canal by the several cities of the District were required to be held in and by virtue of the act approved on the 7th day of June, 1836, entitled 'An act for the relief of the several corporate cities of the District of Columbia,' that the secretary of the treasury be and he is hereby authorized and empowered to advance, out of any moneys in the treasury not otherwise appropriated, to the canal company, from time to time as the progress of the work may require the same, such sums of money not exceeding \$300,000 as may be necessary to complete the said canal to the town and harbor of Alexandria."

That act simply repeated in respect to the branch canal the policy and purpose of the act of the preceding May, already mentioned respecting the main work, and I cannot entertain a doubt that it was in the contemplation of congress that all the three thousand five hundred shares which Alexandria had thus subscribed to the stock of the Alexandria Canal Company should be turned over to the secretary of the treasury on his payment to her of the \$300,000 of cash appropriated by the act of March 3, 1837. To contend otherwise seems to me to be contrary to reason and all probability.

Shortly after the act last mentioned the authorities of Alexandria turned over to the secretary of the treasury, upon a payment then made by that officer of part of the sum that had been appropriated for the city, one thousand five hundred shares of canal stock, which was all that she could then deliver. The secretary went on at different times to pay other instalments of the appropriated \$300,000 until all was paid. With this money Alexandria presumably completed the payment of her subscriptions on her remaining two thousand shares of stock; but these shares were never delivered to the secretary of the treasury, nor never called for. I regard this omission as an act of sheer inadvertence. The stock became or had become absolutely valueless in the market; and it never seems to have occurred to the mind of any secretary of the treasury to call upon Alexandria for the undelivered two thousand shares still due.

The city afterwards subscribed for one thousand five hundred additional shares of this stock in the Alexandria canal, making in all, with that delivered to the secretary of the treasury, five thousand shares. Ten years after the act of congress which has been mentioned she made an exchange of two thousand seven hundred and twenty of her shares with the state of Virginia for an equivalent amount of state bonds at par value, and has now only seven hundred and eighty left at her disposal.

The bill in this case is filed to require a specific performance by Alexandria of her obligation under the act of congress of March 3, 1837. I think that nothing could well be more clear than the obligation of Alexandria to comply with the prayer of the bill, by delivering to the secretary of the treasury the two thousand additional shares of the stock of the Alexandria Canal Company still due.

§ 327. *The neglect of its officers cannot make a case of laches against the government. Time does not run against the United States.*

It is objected by her counsel that the lapse of time has been so great, and the laches of the United States so signal, that it would be inequitable now for Alexandria to be called upon to perform this obligation. But time does not run against the United States, and public policy forbids that the negligence of the officers of an immense government like ours should be held to create laches on the part of the government, except, probably, as to third persons who are strangers to transactions as to which the negligence may occur.

In *United States v. Kilpatrick*, 9 Wheat., 720 (Bonds, §§ 419-22), the supreme court say: "The general principle is that laches is not imputable to the government. The utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions. It would in effect work a repeal of all its securities." In *United States v. Vanzandt*, 11 Wheat., 190 (Bonds, §§ 772-73), the court say: "The neglect in the one case and the other imputes laches to the officer whose duty it was to perform the acts which the law required; but, in a legal point of view, the rights of the government cannot be affected by these laches."

"A claim of the United States is not released by the laches of the officer to whom the assertion of that claim was intrusted." *Dox v. Postmaster-General*, 1 Pet., 325 (Bonds, §§ 769-71). "Statutes of limitation do not bind the United States unless it is specially named therein." *Lindsey v. Miller*, 6 Pet., 666; *United States v. Hoar*, 2 Mason, 311. "The unauthorized act of the officer of the United States (in the matter of a claim for or against it) cannot bind the United States." *Filor v. United States*, 9 Wall., 49.

If, indeed, there could be any rational doubt entertained in regard to the reason why not more than one thousand five hundred shares of the canal stock were delivered in 1837, or any reasonable pretension that such delivery was in fact accepted by the United States as completing the obligation of Alexandria; and if this doubt could not be cleared up because of the death of witnesses who were cognizant of the transaction, and loss of evidence touching it, this court, as a court of equity, might hesitate to enforce the specific performance of a contract thus rendered obscure by long lapse of time. But, as already said, I do not think there can be any reasonable doubt of the facts of the original transaction, or of the intention of congress or of Alexandria in entering into it.

§ 328. *Under what circumstances equity will, and when it will not, enforce a long standing obligation.*

Where an obligation is clear, equity will not refuse to enforce it because of mere lapse of time since its origin. True, that in cases where the rights of third persons have become involved, equity will often refuse to enforce a long standing obligation to the injury or prejudice of such persons. So where the terms or nature of a long standing obligation have become uncertain in consequence of the lapse of time, the loss of evidence or the death of witnesses, equity will sometimes refuse to enforce it in consequence of this uncertainty;

it will not make a decree apparently just where there is danger in making it of doing real injustice.

Such are some of the considerations on which equity will refuse to enforce an old obligation. But where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly as between the immediate parties to the transaction. See the case of *Etting v. Marx*, 4 Hughes, 312, where the doctrine of limitations in equity is very elaborately discussed as to suits between private individuals. But the parties to the present transaction are, on one side, a government of permanent stability, and on the other a municipal corporation older than the government.

§ 329. *Distinction between public corporations and private persons with reference to the permanency of continuing obligations and lapse of time.*

They are not like natural persons, whose relations and obligations are all more or less affected by mere lapse of time. The reason which induces equity to look with disfavor upon old and stale claims as between natural persons ceases when applied to governments and public corporations. Forty years in the life of such bodies are but as so many days or months in the life-time of individuals. Obligations between them are just as enduring. I must hold that, as between the United States and Alexandria, time has not released the city from the obligation to deliver to the secretary of the treasury the three thousand five hundred shares which she had in March, 1837.

It cannot be necessary to answer at length the wholly untenable pretension that the corporation of Alexandria, when it delivered the certificate for fifteen hundred shares, was absolved from further obligation because it did not own the remaining two thousand shares; for it is a familiar doctrine that if one undertakes to grant property not yet in possession nor paid for, but which he subsequently does acquire and pay for, the title inures to his first grantee.

It is no objection to a decree being made for specific performance of a part of a contract when the performance of the remainder has been made impossible by the act of the defendant. To permit such an objection to prevail would be to violate the maxim that no man shall take advantage of his own wrong.

See Fry on Specific Performance, section 294, citing Lord Eldon, who, in speaking of one who had undertaken to convey a greater interest than he possessed, says: "For the purpose of this jurisdiction the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, . . . and the court will not hear the objection by the vendor, that the purchaser cannot have the whole." See, also, *Morss v. Elmendorf*, 11 Paige, 287; *Hatch v. Cobb*, 5 Johns. Ch., 559; *Kempshall v. Stone*, 5 Johns. Ch., 193; Fry on Specific Performance, secs. 554, 258.

The latter is to this point, that where a hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defense against the specific performance of the contract, at least whenever the thing he has contracted to do is reasonably possible. In *Bennett v. Abrahams*, 41 Barb., 619, it is said where specific performance of a contract is impossible, the plaintiff may have approximate relief in some other form, which will secure him the substantial advantage of the agreement.

The state of Virginia is not a party to this suit, and could not be required to return any part of the two thousand seven hundred and twenty shares

which she obtained from Alexandria, if she were. It is not shown that she was made cognizant of the fact that Alexandria had not an equitable right to deliver to her as many of the shares of the canal company as she did deliver. The evidence does not show that this fact was brought home to the mind of the Virginia legislature when that body passed the act authorizing the exchange of state bonds for these shares; though it does show that Alexandria, in the persons of her agents, was informed that she was violating her obligations to the United States in soliciting and making that exchange.

As to the damages claimed by the bill against the city, from the non-delivery of the two thousand shares to which the United States are still entitled, I do not think it would be equitable for this court to do more than require these missing shares to be delivered. It was not intended by the United States in the act of March 3, 1837, to create a money demand directly or indirectly against the city, and I am not disposed to make a money decree against the city.

I do not think the measure of damages, in this particular case, is the highest price which the shares of the canal company have commanded in the market since the delinquency, as contended by counsel for plaintiffs. What steps should be taken in this suit to enforce the full performance of the obligation of the city must be hereafter determined. I will at once make a decree requiring the city to transfer to the secretary of the treasury the seven hundred and eighty shares still held by her, and to make up the remainder of the two thousand shares yet due.

§ 330. In general.— Courts of equity always discountenance laches and neglect. *Ex parte Storer*, Dav., 294; *Hayward v. National Bank*, 6 Otto, 611.

§ 331. A court of equity applies the rule of laches according to its own idea of right and justice. *Brown v. County of Buena Vista*,* 5 Otto, 159.

§ 332. Where there has been gross laches equity will not interfere. Six years' delay to assert rights is such laches. *McQuiddy v. Ware*, 20 Wall., 14.

§ 333. A delay of nine years after the ground of relief was perfected before bringing suit is laches. *New Albany v. Burke*, 11 Wall., 96.

§ 334. Imperfect rights must be asserted with vigilance. *Brobst v. Brock*, 10 Wall., 519.

§ 335. Parties under no disability who for many years sleep upon their rights cannot enforce them through a court of equity. *De Lane v. Moore*, 14 How., 253.

§ 336. Lapse of time a defense in equity in cases not within the operation of the statute of limitations. *United States v. Tichenor*, 12 Fed. R., 426.

§ 337. Lapse of time in equitable proceedings only supposes payment; it is not an absolute limitation. *Postmaster-General v. Rice*, Gilp., 662.

§ 338. A court of equity will refuse to lend its aid to stale demands. *Cleveland Ins. Co. v. Reed*, 1 Biss., 187.

§ 339. Where the transactions out of which the suit arose had occurred sixty-five years ago, the subject of the suit, the estate of a decedent, having been in litigation in some form during all that time, and the particular suit had been commenced thirty-six years ago, the court expressed itself as not inclined to add to the length of the litigation by looking after mere form in order to avoid substance. *Crosby v. Buchanan*, 23 Wall., 420.

§ 340. Long acquiescence in a grievance is a bar to relief in equity. *Ketchum v. Mobile & Ohio Railroad Co.*, 2 Woods, 532.

§ 341. Where for twenty years the laches of defendant has prevented the accruing of a cause of action for plaintiff, his remedy is not barred by the lapse of six or even ten years. *Guntton v. Carroll*, 11 Otto, 426.

§ 342. Lapse of six years in bringing suit cannot help the defendant where the delay has not injured his property or rights. *Allore v. Jewell*, 4 Otto, 506.

§ 343. A court of equity, acting on sound discretion, will refuse to aid a party who does not act in conscience, good faith and with reasonable diligence. *Bowman v. Wathen*,* 1 How., 189.

§ 344. There is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases courts

of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Badger v. Badger*, 2 Cliff., 187.

§ 345. In the case of a claim stale upon the ground of gross laches, and long unexplained acquiescence in the operation of an adverse right, courts of equity will often treat a lapse of a less period than the one specified in the statute of limitations as a presumptive bar to the claim. *Ibid.*

§ 346. Courts of equity are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and a case at law on which a statute of limitation would operate. *Putnam v. New Albany*, 4 Biss., 365.

§ 347. In cases of concurrent jurisdiction if a party sleeps on his rights until the progress of events and change of circumstances have put it out of the power of the court to do equal justice between the parties, which as a court of conscience it is bound to do, it will remain passive, and leave the party to his legal remedy. *Person v. Sanger*, Dav., 252; 5 N. Y. Leg. Obs., 43.

§ 348. Long acquiescence and laches by parties out of possession cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of those in possession, which will appeal to the conscience of the court; especially where there is knowledge of the claim of those in possession, and the property has, by their industry, greatly increased in value, and some of the parties are dead. *Wagner v. Baird*,* 7 How., 234.

§ 349. Where a party seeks to enforce a claim in equity, who has for a long time acquiesced in the assertion of adverse rights, he should set forth specifically the impediments to an earlier prosecution of his suit. *Marsh v. Whitmore*, 21 Wall., 178.

§ 350. Where a person directed, by his will, that all his property should be "divided among his children," and also gave "to each of his daughters a small tract of land," and one of the daughters and her husband received a small tract of land, and a partition having been made in which she received nothing, and neither she nor her husband took any steps for thirty years to set aside the partition, and at the time of her marriage she was a minor, it was held, in a suit to set aside the partition, brought soon after the death of her husband, that no presumption of acquiescence could be made against her. *Weatherhead v. Baskerville*, 11 How., 329.

§ 351. Laches and delay must be duly accounted for before equity will interpose. *Gould v. Gould*, 3 Story, 516.

§ 352. Where a bill is brought for an account after a great lapse of time, the reason should be stated why it was not brought at an earlier period. *Stearns v. Page*, 1 Story, 204.

§ 353. Unreasonable delay on the part of the plaintiff must be accounted for by good and sufficient reasons, and not statements of imaginary difficulties or unreal obstacles. *Fisher v. Boody*, 1 Curt., 220.

§ 354. The imputation of staleness is in equity averted by the poverty of the suitor, although inability to bring a suit is no excuse if the statute of limitations has created a bar. *Mason v. Crosby*, Dav., 313.

§ 355. Lapse of time does not operate against minors, especially if they are non-residents of the state. *Ware v. Brush*, 1 McL., 533.

§ 356. Mere delay in enforcing equitable rights is not a defense to a suit unless the statute of limitations applies or the claim has become stale. *Williams v. Boston & Albany Railroad Co.*, 17 Blatch., 23.

§ 357. Lapse of time, unexplained, short of the statute of limitations may be a bar to the rescission of a contract; if there is fraud or the delay is accounted for, it is no bar. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 358. Staleness will bar in equity where no statute of limitation applies. *Sullivan v. Portland & Kennebec Railroad Co.*, 4 Cliff., 226.

§ 359. Lapse of time and staleness of a claim will operate as a bar in equity, where no statute of limitations governs the case. *Livingston v. Proprietors of the Ore Bed in Salisbury*, 16 Blatch., 560.

§ 360. Time in equity often operates as a bar in a case where, at law, the statute could have no effect. *Bowman v. Wathen*, 2 McL., 376.

§ 361. Even though lapse of time be not pleaded in bar, the opinion and decree of the court will be influenced by delay not sufficiently accounted for, where the bill seeks to rescind a sale. *Fisher v. Boody*, 1 Curt., 206.

§ 362. The staleness of a demand may be relied on at the hearing without plea or demurrer. *Baker v. Biddle*, 1 Bald., 394.

§ 363. Illustrations of the rule.—One Braun brought suit in February, 1868, in a state court against Sauerwein, a collector of internal revenue, to recover moneys alleged to have

been illegally exacted. The statute of limitations prescribed a limitation of three years, but an act of congress, which took effect August 1, 1866, prohibited suits of that nature until an appeal to the commissioner of internal revenue had been taken, and a decision rendered by him, and if the decision was delayed more than six months, then a suit might be commenced within one year from the date of appeal. An appeal was so taken in August, 1867, which was decided in January, 1868. The money had been exacted in February, 1864. *Held*, that as more than three years had elapsed, exclusive of the period during which the remedy had been suspended, the plaintiff was guilty of laches, and his right of action barred. *Braun v. Sauerwein*,* 10 Wall., 218.

§ 364. A delay of twenty years is, in the view of equity, unreasonable, and after that period equity will not enforce a trust. One McKnight had, in 1818, conveyed certain property in Alexandria to Robert J. Taylor upon trust that if McKnight should not on April 1, 1818, pay certain creditors named, he was, on notice of the default, to sell the property and discharge the debt. In 1837 Taylor filed a bill stating that he had been required by certain creditors to sell the land for unpaid debts; that there was an outstanding cloud upon the title necessitating the action and praying a decree for sale and cancellation of the outstanding deed, and McKnight defended on the ground of laches. *Held*, that equity would not act unless conscience, good faith and reasonable diligence called into action its powers, and that as the creditors had slept on their rights for nearly twenty years, they were guilty of such laches as would deny them relief in equity. *McKnight v. Taylor*,* 1 How., 161.

§ 365. A bond for the conveyance of an interest in land, upon the payment of certain obligations, will not be enforced by a court of equity after twenty years after the obligation is payable. One Wright, claiming as the assignee of Shepherd, brought an action to enforce a bond in which Fullerton bound himself, upon the payment of certain described notes, to convey to Shepherd one-half interest in certain lands in Cook county, Illinois. The assignment was made in 1836. Tender of the amount of the notes was made and refused in 1836. The cause of the refusal was uncertain. *Wright v. Fullerton*,* 2 Biss., 336.

§ 366. A decree settling the accounts of an executor will not be opened after the lapse of twelve years, when there are no circumstances excusing the delay. A suit to impeach accounts should be brought within the period prescribed by the statute of limitations for actions at law upon matters of account, or else some ground of exception or disability within the analogy of the statute to justify or excuse the delay should be shown. Thus where a suit was commenced in 1833 to open certain accounts of administration, upon the ground of certain errors and omissions as settled by *ex parte* accounts in the orphans' court of Alexandria in 1816, 1818 and 1821, the prayer was denied on the ground of laches. *Lupton v. Janney*,* 13 Pet., 381.

§ 367. It is laches to delay five years in bringing a suit to set aside a judicial sale. *Harwood v. Railroad Co.*,* 17 Wall., 78.

§ 368. Laches cannot be alleged against the United States in favor of a surety on a bond. *Raymon v. United States*,* 14 Blatch., 51.

§ 369. Where one with sufficient knowledge of the facts to put him on inquiry permits another to hold property and create liens thereon, or superior equities in favor of innocent third parties, he must suffer the loss occasioned by his laches. *Babcock v. Pettibone*, 12 Blatch., 354.

§ 370. A court of equity will not give relief upon the ground of a delay on the part of the respondent in executing a contract with the complainant, where the complainant has assented to and acquiesced in the delay. *Sloo v. Law*, 1 Blatch., 512.

§ 371. Lying by and acquiescence on the part of the plaintiff, though not pleaded in bar by the defendant, particularly where such delay renders the court unable to restore the parties to their original condition, is sufficient to induce it not to rescind a deed of conveyance as prayed for. *Fisher v. Boody*, 1 Curt., 220.

§ 372. The complainant brought his bill against the defendants as survivors of four trustees to whom his ancestor had conveyed real and personal estate for the payment of his debts, and to hold the surplus in trust for himself, seeking a discovery and account. The original conveyance had been made in 1793. There had been an assignment of the bond for reconveyance to one of the defendants in 1801, which was recorded in 1809. The original grantor had died in 1814; and the bill was not filed until 1816. No attempt was made during the life-time of the original grantor to set aside the assignment or procure a settlement of the claims urged by the bill. *Held*, that this lapse of time and acquiescence should be considered as an objection to the bill. *West v. Randall*, 2 Mason, 181.

§ 373. Equity will not give relief against duress, where the delay is protracted unreasonably and without excuse, and the subject-matter has largely increased in value, and the evidence is conflicting. A bill was filed in October, 1869, to set aside a deed on account of duress. The deed was executed in July, 1857. The evidence as to the duress was conflicting, and the property had increased greatly in value, owing to permanent improvements made by defendant,

the explanation of the delay being that the plaintiff stood in fear of a person, one of the parties to the deed, who died in 1868. *Murphy v. Paynter*,* 1 Dill., 333.

§ 374. A judgment in ejectment had been recovered by defendant for the recovery of certain lands in Tennessee, and the complainants prayed an injunction and a conveyance of defendant's interest to them. An entry of the land had been made in 1785, and in 1787 Isaac Coulson executed a bond to Josiah Payne, conditioned for the conveyance of the land or the payment of £100. The obligor elected to convey the land, but died in 1791, in Virginia, leaving the defendant as his heir. A grant of the land had been issued in 1787, but no valid conveyance to Payne was made. Payne took possession in 1799 or 1800, and the land had been occupied ever since by him and those claiming under him, the last of whom was complainant. Coulson died in 1791, and Payne tried to obtain conveyances of the interests of his heirs through the courts of Virginia in 1793 and 1797, and in so doing had been aided by Coulson's widow and brother, the heirs being minors. Payne died in 1806 and had previously sold several parcels of land. At this time there were no equity courts in Tennessee. *Held*, that, considering the condition of the parties, their remote residence from each other, the state of the country and its tribunals, the complainants had shown more than ordinary diligence, and were not guilty of laches and were entitled to relief. *Coulson v. Walton*,* 9 Pet., 62.

§ 375. Under the rules of equity, where a party sleeps upon his rights for fifty years, with no obstacle to prevent him from perfecting his title, relief will not be granted. *United States v. Moore*, 12 How., 209.

§ 376. A lapse of forty-six years is a bar to relief in equity, although the creditor, during all the time, supposed the debtor to be insolvent, and in fact for a large portion of the time he was in condition to pay, which fact might have been discovered by the creditor by the exercise of reasonable diligence and a recovery had at law. *Maxwell v. Kennedy*, 8 How., 210.

§ 377. Where a party in interest consented to a sale of property, and subsequently took the benefit of the insolvent law, after which a decree of sale was obtained, his attorney consenting, and the trustee did not become a party until after two years, and did not object until after fifteen years more, it was held too late. *Kennedy v. Georgia State Bank*, 8 How., 586.

§ 378. Presumption of payment is not the only ground upon which a court of equity refuses its aid to a stale demand. There must appear to have been reasonable diligence to call its powers into action. If, therefore, the complainant, by his own showing, has been guilty of laches, he is not entitled to the aid of the court, though the debt be still unpaid; and the objection may be taken by demurrer. *Maxwell v. Kennedy*, 8 How., 210.

§ 379. Where property of a judgment debtor has been taken upon execution, a bill in equity will not lie to restrain proceedings thereon on the ground of misconduct and delay on the part of the creditors in not proceeding in garnishment proceedings resorted to for the collection of the debt, unless it is shown that loss to the judgment debtor has resulted from such delay. *Boyle v. Zacharie*, 6 Pet., 645.

§ 380. Where proceedings were instituted to set aside a judicial sale six years after it was made, it was held that courts of equity would not look with favor upon a proceeding instituted so long a time after the property had passed into the hands of other and subsequent purchasers without notice. *Johns v. Slack*, 2 Hughes, 467.

§ 381. The proprietors of an ore bed were organized into a corporation, their respective shares in the land being represented by proportional stock in the corporation. The plaintiff brought suit against the defendants to recover a certain number of shares of this stock growing out of this real estate. His deviser, under whom he claimed, had not enjoyed this property, in either form, for fifty years prior to his death, and for more than thirty years the defendants or their assignors had openly claimed and enjoyed the stock as their own. The plaintiff's ancestor was, during these fifty years, in a position to know the history of the property, but had never made a demand for it. *Held*, that the plaintiff could not recover, because of laches and the staleness of his claim. *Livingston v. Proprietors of the Ore Bed in Salisbury*, 16 Blatch., 549.

§ 382. S., being about to die, desired to make a will, leaving all of his property to his natural daughter. Being assured by his two brothers, his heirs-at-law, that he was in no immediate danger, and that they would see that the daughter got every cent of it, he did not do so, and died intestate. The brothers conveyed one-third of the property to the daughter and kept the rest. The daughter married twice; and her second husband, ten years after she attained majority, and twenty-five years after the death of S., and after the death of both brothers, filed a bill against their heirs, seeking an account and recovery. *Held*, that the demand was a stale one and was barred by the statute of limitations, which applies in equity in such cases as well as at law; voluntary disabilities, such as coverture, whether cumulative or not, not being a defense to staleness in equity. *Bedilian v. Seaton*, 3 Wall. Jr., 279.

§ 383. Where parties setting up claim of title to land have slept on their rights forty-nine

years before bringing suit, such lapse of time will be fatal in a court of equity to the claim of complainants, and if apparent on the face of the bill will be a sufficient ground for sustaining a demurrer. *Copen v. Fleisher*, 1 Bond, 440.

§ 384. But where an amended bill is filed averring that, for a long time after their rights accrued, the complainants were minors residing in different parts of the state and had no knowledge of their rights until about eighteen years before the bringing of the suit, and were not apprised until about that time of the location of the land, and were unable, until some time after that year, to take steps in the assertion of their rights, *held*, that though the facts stated in explanation of the delay were vague and unsatisfactory, they were sufficient to relieve the amended bill from the objection taken to the original bill on the ground of staleness. *Ibid*.

§ 385. A delay in rescinding a contract and in instituting proceedings for a recovery of the money, though not so long as to be a technical or equitable bar by the statute of limitations to any relief, yet may be so long as to change the positions of the parties and their remedies over on third persons, and thus excuse them in equity for the sums paid over to such third persons. A sale of timber land made in 1835 was rescinded in 1841, on the ground of fraud practiced upon the grantees by one of the two grantors, owners of the paper title, and one of six owners in interest under subordinate contracts. The fraud was not discovered until 1836, and from that time until 1841 negotiations were being carried on to compromise the dispute. The two grantors being the only respondents, it was held that they were severally liable to refund the money each had received and retained for his equitable share in the premises, but that they were not responsible, considering the lapse of time, for the money, which was paid over to the other equitable shareholders immediately upon the consummation of the sale, nor for that part of the money which was paid to the agent who effected the sale for his services, and never came into their hands, such agent having in the meantime died insolvent. *Mason v. Crosby*, 1 Woodb. & M., 342.

§ 386. On bill brought to enforce a parol trust or parol promise to convey property, *held*, that a delay of ten years in bringing suit from the time of the removal of plaintiff's involuntary disability was sufficient to render the case stale; and that voluntary disabilities, such as absence from the state or coverture, acquired after the involuntary disability of infancy had been removed, could not be received as a defense against the charge of staleness. *Bedilian v. Seaton*, 3 Wall. Jr., 279.

§ 387. Where the mortgagee of a vessel allowed her to depart from her home port to the port of New York in possession of her papers showing B. to be owner, and without notice or qualification to the contrary attached to them, and B., after the arrival at such port, sold the vessel at public auction for a valuable consideration to a *bona fide* purchaser, who bought after seeing her papers, *held*, that the mortgagee was guilty of such laches as to prevent him from setting up his mortgage priority as against such purchaser. *The Schooner Romp, Olc.*, 196.

§ 388. Lands were sold in 1864 by order of the court under a trust deed given by the testator, none of the complainants, who were devisees under the will, being made parties to the foreclosure proceedings. All of the complainants were minors at the time these proceedings were had, nor did they learn of the fact that the property had been sold, or in any way disposed of, until 1871, at which time those who were then of the age of twenty-one years were married women and continued such until this suit was brought to redeem the lands from the trust-deed. *Held*, that the delay in bringing the suit was not such as to make the proceeding a stale one within the meaning of the equity cases, or as to bring it within any of the limitation laws of Illinois. *Chew v. Hyman*, 7 Fed. R., 7.

§ 389. Suit was brought by alien complainants residing in Ireland, and claiming to be next of kin to an intestate who had died in St. Louis, to set aside, on the ground of fraud, the distribution of his personal estate made in 1869 by his executors, acting under the orders of the probate court of St. Louis. It did not appear from the record of the probate court that any notice was published, pending the administration in the probate court, warning the next of kin of the intestate to appear as claimants of the estate. They first obtained knowledge of the death of the intestate in 1874. In 1876 they filed a bill in one of the courts of St. Louis to set aside the distribution for fraud. None of the parties who had received distributive shares of the estate resided in the state of Missouri, and could not be served with process. It was also found that the administrator was protected by the order of the probate court. The complainants then dismissed that bill, and finding a party to whom money had been distributed, they filed this bill in January, 1879. *Held*, that, considering the difficulties in the way of the complainants, and that the defendant had been in no way prejudiced by the lapse of time, the equities being plain, the defense of laches could not prevail. *Sullivan v. Andoe*, 6 Fed. R., 641; 4 Hughes, 290.

§ 390. In 1867 A. entered into a compromise with his debtors by which the notes of one B., secured by marriage settlement made between B. and wife before marriage, were received as settlement in full, the notes being indorsed to A. "without recourse except as to considera-

tion." At the time of this compromise a suit, instituted by creditors of B. to set aside the marriage settlement as fraudulent, was pending in a state court. In 1874 a decree was rendered sustaining the marriage settlement. In 1878 a decree was rendered in a circuit court of the United States upon suit begun in 1870 by the assignee in bankruptcy of B., declaring the same settlement void. Appeals from both these decisions were taken in 1879, and while the appeal suits were pending, A. filed a bill to set aside the compromise settlement of 1867 on the ground of fraud, mistake and want of consideration. *Held*, that his claim had become stale by lapse of time, and that his rights to assert such claim had been waived; further, that A.'s claim that the alleged fraud had not been discovered by him until 1870, and that he could not have known that the marriage settlement was void because the question was pending during all this while in the courts, was not sufficient to excuse his laches. *Chapman v. Succession of Wilson*, 5 Fed. R., 305.

§ 391. A. and B. made a fraudulent entry of land, which was afterwards set aside by the land office officials. Subsequently B. made an actual settlement, and obtained a patent in 1838, and sold all his interest in such land in 1841 to C., who continued in possession until 1854, when, the land having become very valuable, being laid off into city lots, a bill in equity was brought by the heirs of A., seeking the legal title of C. *Held*, that under the circumstances lapse of time would prevent the granting of relief. *Harkness v. Underhill*, 1 Black, 316.

§ 392. It is a strong circumstance disproving a material mistake as to the premises, that the purchaser occupied them nearly six years without complaint; and such an occupation, without any fraud to conceal mistakes, is strong evidence not only against mistakes, but of a negligence in seeking relief, which should bar it. *Ferson v. Sanger*, 1 Woodb. & M., 138.

§ 393. Where a bill in equity was brought to set aside a sale of certain timber lands seven years after the purchase thereof, during which time the agent of the purchaser had made two explorations of the land and had caused a large quantity of timber to be cut therefrom, *held*, that the purchasers had full knowledge or means of knowledge of the condition of the lands, through their agent, which they were bound to exercise, before cutting down timber and locating the property as their own; and that the bill was not maintainable after so great a lapse of time, particularly as it set forth no new discoveries in relation to the quantity and value of the timber which might not have been obtained in a single year, and as the evidence was obscure as to material points. *Hough v. Richardson*, 3 Story, 659.

§ 394. Where stockholders in a railroad company have knowledge of facts constituting fraud in the execution of certain bonds and mortgages, are advised of the foreclosure suit upon such bonds and mortgages, have a knowledge that such foreclosure suit is not being properly defended by the officers and attorney of the company, they or any of them are at liberty to apply to the court to intervene and defend; but when no such action is taken, and no bill filed for relief until four years after the rendition of the decree, which in the meantime has been fully executed, and the property of the company sold thereunder to a new company, the stock and bonds of which are already upon the market, it is too late to attack the validity of the proceedings on the ground of fraud. *Pacific Railroad v. Missouri Pacific R'y Co.*, 13 Fed. R., 641.

§ 395. Where a widow obtained a judgment against a railroad company for negligently causing the death of her husband, and the children of the deceased, by a former marriage, were in some way induced to believe that they were not entitled to any portion of the money thus recovered until the youngest sister came of age, and as soon as this happened immediately took steps to recover their dues, *held*, that their delay did not constitute such laches as to preclude them from asserting their rights in a court of equity. *Thomas v. Armstrong*, 12 Fed. R., 666.

§ 396. If there is no person in existence competent to receive payment of the debt, to secure which property has been conveyed in trust, the court will, after a lapse of sixteen years, decree a conveyance by the trustee to the heirs of the debtor. *United States v. White*, 5 Cr. C. C., 470.

§ 397. After long delay and laches a court of equity will not decree a specific performance of an award respecting real estate, especially where there has been a material change of circumstances, and injury to the other party. *McNeil v. Magee*, 5 Mason, 244.

3. *Fraud.*

SUMMARY — Due diligence to detect fraud, § 398.— *Trusts*, § 399.— *When statute begins to run*, § 400.

§ 398. In order to avoid the bar of the statute of limitations on account of fraud, it must be averred and shown that due diligence to detect the fraud was used. *Wood v. Carpenter*, §§ 401, 402.

§ 399. A bill to establish a trust on account of fraud will be dismissed on the ground of staleness after the lapse of twenty-five years, where the facts giving rise to the fraud have been acquiesced in and important witnesses are dead, and the whole transaction was public, and there has been no concealment. So held in an action brought to set aside a sale of real estate, made under an order of the court obtained by an administrator to satisfy a claim due himself. The sale took place in 1830, and the suit was commenced in 1858, alleging fraud in the claim and its approval by the widow and heirs. *Badger v. Badger*, §§ 403, 404.

§ 400. The statute of limitations as to actions for relief on the ground of fraud does not begin to run until the fraud is discovered, but the fraud must be secret and concealed. In *Missouri* the discovery must be made within ten years. So held in an action to recover certain property on the ground of fraud. The fraud commenced in 1861, by a debtor giving money to buy up his debts at a small valuation, and continuing his business under other names, and transferring his property so as to have it stand in the name of others. The plaintiff was an assignee in bankruptcy, and the bill was filed in 1868. *Martin v. Smith*, §§ 405-11.

[NOTES.—See §§ 412-437.]

WOOD v. CARPENTER.

(11 Otto, 135-143. 1879.)

ERROR to U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This action was brought October 21, 1872. The amended complaint or declaration makes the following case: William L. Wood, the plaintiff, recovered judgments in the Vanderburg circuit court against Willard Carpenter upon sundry promissory notes and bills of exchange. The first judgment bore date on the 16th of May, 1860, and the last on the 22d of August in that year. In the aggregate they amounted to the sum of \$8,557.07. At the dates of the notes and bills the defendant was the owner of real and personal estate of the value of \$500,000. For the purpose of defrauding the plaintiff and others by depreciating the value of their claims against him, and of thereby inducing them to sell the claims to him for less than their face, the defendant, in the year 1858, entered into a fraudulent conspiracy with his brother, Alvin B. Carpenter, and others to the plaintiff unknown, to incumber his real estate and hide away the title so that the property should not be sold to pay his debts, but in the end inure to his benefit. In pursuance of this scheme he confessed sundry fraudulent judgments for large sums, and afterwards made a fraudulent assignment of all his property to William H. Walker and William D. Allis, and thereafter procured the title to all his real and personal estate to be vested in his brother Alvin and others, who held the property in secret trust for the defendant. In this way the title was so concealed that the plaintiff was prevented from levying executions issued upon his judgments. On the 14th of January, 1862, the plaintiff, in order to compel the defendant to pay his judgments, caused him to be arrested by the sheriff, in Massachusetts, upon final process. The defendant was taken before a master in chancery, and afterwards, before the master, took the insolvent debtor's oath according to the law of that state, and was thereupon discharged. Upon that occasion he falsely deposed and swore that he was not possessed of pecuniary means to the extent of \$20, and that he had in good faith assigned all his property for the benefit of his creditors. From that time forward the defendant falsely pretended to the plaintiff and his other creditors that he was poor and wholly unable to pay his debts, or any part of them. Having thus put his property beyond the reach of process upon the plaintiff's judgments, and procured his discharge from custody in Massachusetts, and led the plaintiff to believe he had no property out of which the

judgments could be collected, the defendant afterwards, on the 1st of January, 1864, in further pursuance of the conspiracy, pretended and represented that his son-in-law, one D. C. Keller, would purchase the judgments with his own means, and so procured the plaintiff, who acted upon the belief of the truth of the representations and of the perjured statement of the defendant, to assign the judgments to Keller for fifty per cent. of their principal and interest, amounting to \$5,104.52, whereas, in fact, the judgments were bought by Keller with money furnished by the defendant, and they were held in trust by Keller for the defendant until June 1, 1873, when Keller, at the instance of the defendant, caused satisfaction to be entered. Before and since the rendition of the judgments the defendant owned property worth exceeding \$200,000. The title was held in secret trust for him by his brother Alvin and others, and was fraudulently concealed from the plaintiff until long after the assignment of the judgments. Within twelve months past the property was all reconveyed to the defendant, and he holds it by an indefeasible title. The plaintiff had no knowledge of the ownership of the property by the defendant, nor of the secret trust, nor of the falsity of his representations, as alleged, until during the year 1872.

The defendant filed an answer consisting of three paragraphs: 1. He denied all the allegations of the petition. 2. He alleged that the causes of action set forth in the petition did not accrue within six years. 3. He averred that he was not guilty of any of the grievances set forth in the complaint at any time within six years before the commencement of the action.

The plaintiff's reply to the second and third paragraphs averred as follows: The defendant concealed the facts that the judgments confessed in favor of Chapman and others were fraudulent; that Alvin C. Carpenter held the said property, real and personal, in trust for the defendant; that the defendant had committed perjury before the master in Massachusetts; that Keller had bought the judgments with the defendant's money, and for the defendant's use and benefit; that the defendant was in fact the owner of the property, and that it was held by his brother and others in secret trust for him; and that his representations as to his insolvency were false and fraudulent. It was averred further that the concealment was effected by the defendant by means of fraud, perjury, and the other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit.

The defendant demurred to the last two paragraphs of the reply. The demurrer was sustained. The plaintiff not asking leave to amend, the court gave judgment against him, and he thereupon sued out this writ of error.

The only question presented for our consideration is whether the demurrer was properly sustained. The statute of limitations relied upon by the defendant declares: "The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards." 2 Rev. Stat. of 1876, p. 121. ". . . If any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." *Id.* 128, sec. 219. Both these provisions apply to actions for fraud. *Musselman v. Kent*, 33 Ind., 453; *Cravens v. Duncan*, 55 *id.*, 347. The statute begins to run when the fraud is perpetrated. *Wynne v. Cornelison*, 52 *id.*, 312.

In the case in hand the specific wrong complained of, and the gravamen of

the action, is the transfer of the judgments against Carpenter for the consideration of fifty cents on the dollar of principal and interest, when it is averred they were good for the entire amount, and which transfer, it is alleged, was brought about by the fraud and misrepresentations of the defendant and Keller. It is averred in the complaint that they were assigned on the 1st of January, 1864. The cause of action then accrued, and the statute began to run. The averments of fraud, aside from this transaction, are only matters of inducement. The bar of the statute became complete on the 1st of January, 1870, unless the reply brings the case within section 219, which declares that, where there is concealment, such actions may be brought within the time limited, after the discovery of the cause of action.

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

The provision in the statute of which the plaintiff seeks to avail himself was originally established in equity, and has since been made applicable in trials at law. There is no trace of it in the English statute of limitations of the 21st of James I., which was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country. Having been imported from equity, the adjudications of equitable and legal tribunals upon the subject are alike entitled to consideration.

Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it.

It will be observed, also, that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. It should be borne in mind that when the judgments were assigned to Keller the country was in the throes of the civil war. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. A transaction which then seemed wise and fort-

unate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another.

§ 401. *A fraud that will prevent the operation of the statute of limitations of Indiana must be one that is secret and concealed, and the plaintiff is held to strict averments of concealment and ignorance, and of details of discovery.*

The discovery of the cause of action, if such it may be termed, is thus set forth: "And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit." There is nothing further upon the subject.

In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Stearns v. Page*, 7 How., 819, 829. "This is necessary to enable the defendant to meet the fraud and the time of its discovery." *Moore v. Greene*, 19 id., 69, 72. The same rules were again laid down in *Baubien v. Baubien*, 23 id., 190 (§§ 750-51, *infra*), and in *Badger v. Badger*, 2 Wall., 95 (§§ 403-4, *infra*).

A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr v. Hilton*, 1 Curt., 230. The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. *Martin v. Smith*, 1 Dill., 85 (§§ 405-11, *infra*), and the authorities cited.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it." *Kennedy v. Greene*, 3 Myl. & K., 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." *Angell, Lim.*, sec. 187 and note.

§ 402. *To avoid the bar of the statute on account of fraud due diligence to discover the fraud must be used.*

A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power he will be held to have known it. *Bucker & Stanton v. Calcote*, 28 Miss., 432, 434. See, also, *Nudd v. Hamblin*, 8 Allen (Mass.), 130. In *Cole v. McGlathry*, 9 Me., 131, the plaintiff had given the defendant money to pay certain debts. The defendant falsely affirmed he had paid them, and fraudulently kept the money. It was held that the plaintiff could not recover, because he had at all times the means of discovering the truth by making inquiry of those who should have received the money.

In *McKown v. Whitmore*, 31 id., 448, the plaintiff handed the defendant money to be deposited for the plaintiff in bank. The defendant told the plaintiff that he had made the deposit. It was held that, if the statement were false and fraudulent, the plaintiff could not recover, because he might at all times have inquired of the bank. In *Rouse v. Southard*, 39 id., 404, the defendant was sued as part owner of a vessel, for repairs, and pleaded the statute

of limitations. The plaintiff offered evidence that the defendant, when called on for payment, had denied that he was such owner. It was held that, as the ownership might have been ascertained from other sources, the denial was not such a fraudulent concealment as would take the case out of the bar of the statute.

Numerous other cases to the same effect might be cited. They all show the light in which courts regard the qualification here in question, of the limitation which would otherwise apply. The subject has been several times considered in the state of Indiana, whence this case came. In *Boyd v. Boyd*, 27 Ind., 429, it was ruled that the concealment under section 219, which will avoid the statute, must go beyond mere silence. It must be something done to prevent discovery.

Stanley v. Stanton, 36 id., 445, is instructive with reference to the case before us. In 1870 A. sued B. The complaint alleged that in 1848 B. falsely represented himself to A. to be the agent of C., to whom A. was indebted on a promissory note, and that A. paid the money to B. as such agent, and that B. promised to pay it over to C., which he had not done. B. pleaded the statute of limitations. A. replied that he paid the money to B. on his claim that he was the agent of C.; that B. was not such agent, but concealed the fact from A., and promised A. to pay the money to C., which he had not done, and that by reason of the concealment A. did not discover the cause of action until the fall of the year 1869. It was held that, the concealment being all previous to the accruing of the cause of action, something more than the silence of B. was necessary to prevent the running of the statute, and that the action was barred. The concealment, it was said, must be the result of positive acts.

Wynne et al. v. Cornelison (*supra*) was a case growing out of an alleged fraudulent conveyance. There, as here, there was a demurrer to a paragraph of the reply setting up concealment to countervail the defense of the statute of limitations. The allegations were not unlike those in the case before us. The judgment of the court below sustaining the demurrer was affirmed. The court said: "The statute of limitations is a statute of repose, and where its operation is sought to be avoided by the party liable to the action the allegation and proof should bring the case clearly within the section. The allegation that the defendants pretended and professed to the world that the transactions were *bona fide* transactions, is too general to amount to anything." A wide and careful survey of the authorities leads to these results:

The fraud and deceit which enable the offender to do wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

The reply is clearly bad. It contains some vigorous declamation, but is wanting in the averment of facts which are indispensable to give it sufficiency as a pleading, for the purpose intended. The complaint to which it refers does not help it. Further remarks are unnecessary. The demurrer was properly sustained by the circuit court.

Judgment affirmed.

BADGER v. BADGER.

(2 Wallace, 87-96. 1864.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—This was a bill in equity filed by James Badger against his brother, Daniel Badger, to charge him as trustee for the complainant and the other heirs of their father. The defendant Daniel Badger had been administrator of his father, and as such had presented to the court an account for several thousand dollars advanced on account of the estate, and which account purported to be approved by the widow and the minor heirs by their guardians, and had procured an order of the court for a sale of a portion of the real estate of the deceased for the payment of this account. A sale of the land was made to a friend of Daniel Badger, and it was shortly afterwards conveyed to him. This account was filed in 1827, and the sale made in 1830. The present suit was commenced in 1858; the bill alleging fraud in the account and in procuring its approval by the widow and heirs, and that the land was bought at less than its value by a friend of the administrator, for his benefit; and that the fraud of the defendant was unknown to the complainant and his co-heirs until within five years of the filing of the bill.

Opinion by MR. JUSTICE GRIER.

The numerous cases in the books as to dismissing a chancery bill because of staleness would seem to be contradictory if the *dicta* of the chancellors are not modified by applying them to the peculiar facts of the case under consideration. Thus, Lord Erskine, in an important case once before him, says: "No length of time can prevent the unkenning of a fraud." And Lord Northington, in *Alden v. Gregory*, 2 Eden, 285, with virtuous indignation against fraud, exclaims: "The next question is, in effect, whether delay will purge a fraud? Never—while I sit here! Every delay adds to its injustice and multiplies its oppression." In our own court Mr. Justice Story has said (*Prevost v. Gratz*, 6 Wheat., 481): "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to give ample and decisive relief."

§ 403. *A bill in equity to establish a trust will be dismissed on the ground of staleness where there has been no concealment.*

Now these principles are, no doubt, correct, but the qualifications with which they are stated should be carefully noted: 1st. The trust must be "clearly established." 2d. The facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.

The case of *Michoud v. Girod*, cited by the appellant's counsel, is an example of the class in which the concealment of the fraud was the aggravation of the offense. The facts of the case were "clearly established" by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge, between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions,—remembered or

imagined,—partially stated or wholly misrepresented. The fraudulent concealment was also clearly established. The heirs, who lived in Europe, were deceived by the false representations of the executor, and kept in total ignorance of the situation and value of the estate, having no other information on the subject than that communicated to them by him. The delay was not the consequence of any laches in the heirs, but was caused by the successful fraud of the executor, and was but an aggravation of the offense.

But the case before us has none of the peculiar characteristics of those to which we have referred. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which is alleged to have been fraudulent. The guardian of the complainant, who approved the account, is dead; the widow died in 1855. Two of the heirs were of full age in 1831, and the others afterwards. This bill was filed in 1858. The bill does not state the age of complainant. But at the time of filing his bill he must have been over forty years of age.

The whole transaction was public, and well known to the widow and the heirs and their guardians. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it. There was not and could not be any concealment of the facts of the case. The complainant claims as assignee of his elder brothers and sisters, and uses them as witnesses to prove the alleged fraud after a silence of over thirty years. They attempt to prove the signature of their mother to the documents on file in the court to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction, without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter who was twenty-three years of age when this sale was made, and had full knowledge of the whole transaction, after nearly thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud; and now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of a court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century.

§ 404. *General doctrine of equitable limitations.*

Now, the principles upon which courts of equity act in such cases are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision:

“Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

“In many other cases they act upon the analogy of the like limitations at law. But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or im-

pediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill, in this case, is entirely defective in all these respects. It is true there is a general allegation that the "fraudulent acts were unknown to complainant till within five years past," while the statement of his case shows clearly that he must have known, or could have known if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill. That his mother was entitled to dower in the land if the sale was set aside was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased; a fact fairly to be presumed from her silence and acquiescence for twenty-four years.

The court below very properly dismissed this bill, and refused to examine into accounts settled by the courts with the knowledge of all parties concerned, and commencing forty years and ending thirty years ago, and to grope after the truth of facts involved in the mists and obscurity consequent on such a lapse of time.

If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts declaring that "actions for land sold by executors, administrators or guardians cannot be maintained by any heir or person claiming under the deceased or intestate, unless the same be commenced within five years next after the sale." But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute.

Decree affirmed with costs.

MARTIN v. SMITH.

(Circuit Court for Missouri: 1 Dillon, 85-103. 1870.)

STATEMENT OF FACTS.—A bill in equity was filed by the plaintiff, as assignee in bankruptcy of one Woodward, to recover certain property from the defendant on the ground of fraud. Woodward, while a merchant in St. Louis, became insolvent in 1861, and, on his solicitations, one Smith bought up claims against him at the rate of twenty-five cents on the dollar, and bought out Woodward, the consideration being made up of the claims at their par value. After that time the business was carried on in the names of various persons as agents until 1864, when Gray and Smith entered, nominally, into a limited partnership, the business being really carried on by Woodward. In 1867 Woodward was, on his own petition, declared a bankrupt. In 1861 Woodward conveyed all his real estate to Smith without having consulted him. He also continued to occupy his residence without paying rent. He paid the taxes on all the property, and redeemed other parcels which had

been sold. He obtained the money to do this out of the store. Smith did not draw out any considerable sums from the store. The bill was filed in 1868, and alleged recent discovery of the fraud. The defendants denied the fraud and set up the statute of limitations.

Opinion by DILLON, J.

In the argument at the bar counsel differed, not, indeed, respecting the general nature of the bill, but upon the point whether in the relief sought it embraced the real estate conveyed by the bankrupt to the respondent Smith, as well as the personal property or the interest in the copartnership therein mentioned.

The point is important, for the limitation as to real actions is ten years, and as to personal actions five years. The present bill was exhibited more than five years, but within ten years, after the sale of the goods and the conveyance of the real property. If the averments of the bill and the prayer for relief be carefully examined, it is plain, beyond controversy, that all that is alleged respecting the real estate is in the nature of inducement to show the character of the dealings between Woodward and Smith, and to make probable the *gravamen* of complaint.

It is extremely important that we shall obtain a correct notion of the real nature, scope and purpose of the bill; for upon the view we take of this will depend, as we shall presently see, the question whether the statute of limitations bars the relief sought. The bill is not one to set aside as fraudulent the sale of the specific stock of goods made in February, 1861, or to recover their value as property to which the creditors of the bankrupt are entitled. This sale is indeed set out in the bill, and is alleged therein to have been fraudulent, but it is set forth only as inducement, as the initial transaction of a fraudulent conspiracy and scheme which ended, not with the consummation of that particular sale, but which continued in existence and was flagrant down to the period when Woodward was adjudicated a bankrupt, and when this suit was commenced.

The plea of the statute sets out this sale made in February, 1861, and then alleges that the suit is barred by reason of the lapse of more than five years before it was commenced. The plea misconceives the nature and purpose of the bill, and proceeds upon the mistaken notion that it is brought simply to impeach the sale of the original stock of goods made more than seven years before. The true view of the bill is, that it charges that the real parties in interest in the business of the limited partnership carried on in the name of the defendant Gray are Woodward and Gray, and not Smith and Gray, as appears on the face of the written and recorded articles, and is given out by all three of them to the creditors and the world, and consequently that the interest of Woodward in this business and in the assets of the firm belongs to the assignee for the benefit of his creditors, and it is this interest which the assignee by the present suit is seeking to recover.

The suit is a personal, as distinguished from a real, action, and hence the ordinary limitation period is five years, and not ten, from the time when the cause of action accrued. *Robb v. Woodward*, supreme court Mo., March term, 1870.

In the case just cited the supreme court of Missouri decided, upon the proof before it, that the conveyance of the real estate by Woodward to Smith was fraudulent, and of the correctness of that judgment on this point there can be no question. That case had no relation to the personal property or partner-

ship interests now in controversy, and there was no question as to when the fraud was discovered, and hence what is said in the opinion on these subjects by way of argument by the learned judge who delivered it is not to be taken as points decided by the court.

Upon the proofs in the record now before us we consider the fraudulent conspiracy between Woodward and Smith, charged in the bill, to be so clear as not to admit of fair debate, and that so far from ending with the purchase of the goods in 1861, it continued down to the time this bill was brought. The evidence is voluminous, and it would require too much time, without any resulting benefits, to enter upon a detailed or analytical statement and discussion of it.

Suffice it to say that it firmly establishes that Woodward designed to place the property beyond the reach of his creditors; that Smith made a colorable purchase of the goods to enable the debtor to effect his purpose; that apparently he has received from the sale of the goods in the store all sums which he expended in buying claims against Smith or otherwise; that Woodward was all the time the real, while Smith was only the nominal, party in interest. That the purchase of the stock of goods by Smith was fraudulent is very faintly, if at all, denied by counsel. At all events they have placed the stress of their defense upon the statute of limitations, and it was upon this ground, undoubtedly, that the bill was dismissed by the learned judge whose decree we are called upon to review.

The question involved is alike interesting and important. To determine it we must first look at the statute to ascertain its meaning and purpose, and then at the special character of the case in hand, and see whether it is one where the statute will operate to bar the relief sought. In a suit of this kind the assignee is clothed with all the rights of creditors (whom, indeed, he represents) to impeach transfers of property made by their debtor or colorably held by others in fraud of their rights. *Allen v. Massey*, 1 Dill., 40, 44.

§ 405. *Missouri statute of limitations.*

The code of Missouri declares that "there shall be but one action in the state for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action." 2 Wagner's Stat., 991, sec. 1. The statute of limitations (section 8) enacts that "civil actions other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued." "Section 10, within five years; fifth, an action for relief on the ground of fraud — the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." *Id.*, 918.

§ 406. *State limitations apply in the federal courts, until congress otherwise provides.*

Unless congress has otherwise provided, state statutes of limitation are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the state. It is necessary, therefore, to construe the tenth section of the statute of limitation above quoted, in order to determine its effect upon the rights of the parties to the present suit.

We have had called to our attention no decision of the highest court of the state construing this statute in respect to the *precise* questions which we are now to decide. The legitimate office of construction is to ascertain the legislative

will or purpose; and to this end it is not only proper, but often necessary, to look not simply at the language of the particular enactment under consideration, but also at the subject-matter of it, in the light which the former law or general principles shed upon it.

§ 407. *At present the statute of limitations in Missouri, as to all actions therein mentioned and provided for, applies equally to causes of action formerly cognizable either in equity or at law.*

Formerly, in the state of Missouri, the forms of action and modes of procedure were as at common law, with a distinct equity jurisdiction. At that time the statutes of limitations were, in substance, the same as 21 Jac. 1, ch. 16, and professed to apply only to certain specified actions at law. R. S. 1845, pp. 373, 374. Equity at this time applied, of course, these statutes according to the settled doctrines of that court.

The code subsequently enacted provided, as we have seen, that there should be but "one form of action" — "a civil action;" and the legislature made the statute of limitations apply to all civil actions; which statute would probably be held in this state, as it has been in others under legislation of a similar character, to embrace equitable as well as legal causes of action so far as they fall within the terms of the act. That is, the limitation as to all actions therein mentioned and provided for applies equally to causes of action formerly cognizable either in equity or at law. *Newman v. De Lorimer*, 19 Ia., 244; *Johnson v. Hopkins*, id., 49; *McNair v. Lott*, 25 Mo., 182.

§ 408. *The limitation as to actions for relief, on the ground of fraud, does not begin to run until the fraud is discovered by the aggrieved party.*

In this view it is easy to perceive why the legislature adopted the tenth section of the act concerning the limitation in cases of fraud. If the provision had been *merely* that "actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued," it is extremely probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated, and not as under the well-known equity rule, from the period when the fraud was or should have been discovered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the legislature added the words: "The cause of action in such case shall not be deemed to have accrued *until the discovery by the aggrieved party . . . of the facts constituting fraud.*"

In my judgment the legislature, by this provision, in substance re-enacted the doctrine which had been established by courts of equity, as to the effect of fraud in preventing the running or operation of statutes of limitation. If this be so, it becomes important to examine the nature and grounds of the equity doctrine, the better to understand the meaning of the statute.

Mr. Justice Story states the doctrine of equity thus: "If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." Eq. Jurisp., sec. 1521. "The question often arises in cases of fraud or mistake, . . . under what circumstances and at what time the bar of the statute begins to run." . . . "In cases of fraud and mistake, it will begin to run," he says, "from the time of the discovery of such fraud or mistake, and not before." Id., sec. 1521a.

This distinguished jurist, on the circuit, in the supreme court, and in the preparation of his Commentaries, had frequent occasion thoroughly to explore the subject, and his opinions upon it are entitled to great consideration, though

it is to be regretted that he does not go more into detail. In his Commentaries he does not discuss the nature of fraud which in equity will prevent the bar of the statute from running; nor what, in the view of that court, will amount to a discovery of the fraud. An examination of these topics, as well as of the ground and reason of the rule itself, is essential to a thorough understanding of the subject, and is required by the circumstances of the cause now before us for determination.

§ 409. — *the fraud must be secret and concealed, not open, known or visible, to prevent the bar of the statute.*

As to the kind of fraud contemplated: Some judges have said that the fraud which will avoid the effect of the statute of limitations must be positive and actual fraud. But this is a point which we are not now required to notice, for in this case the fraud was actual and positive. It seems to me quite clear, both from an examination of the authorities and the nature of the case, that the fraud which shall operate to displace the statute or prevent its application is secret or concealed fraud, a fraud unknown to be such to the party injured thereby. In a leading case on the subject Lord Redesdale said: "That as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate; because, until discovery, the title to avoid it does not completely arise, etc. Pending the concealment of the fraud, the statute ought not in conscience to run," etc. *Hovendon v. Lord Annesly*, 2 Sch. & Lef., 624.

That the fraud must be secret or concealed, not open, known or visible, to prevent the bar of the statute from running, is distinctly asserted or assumed in many cases. *Troup v. Smith*, 20 John., 33, 47, 48, per Spencer, C. J.; *Stearns v. Paige*, 7 How., 819, 829; *Carr v. Hilton*, 1 Curt., 230; S. C., id., 399; *McLain v. Ferrell*, 1 Swan (Tenn.), 48; *Bucknor v. Calcote*, 28 Miss., 432; *Wilson v. Joy*, 32 id., 233; *Cook v. Lindsey*, 34 id., 451; *Young v. Cook*, 30 id., 320; *Campbell v. Vining*, 25 Ill., 525; *Farnum v. Brooks*, 9 Pick., 212; *Phalen v. Clark*, 19 Conn., 421; *Moore v. Greene*, 2 Curt., 202; affirmed, 19 How., 69, 72; *Angell on Lim.*, ch. 18; *Sugden on Vend.*, 612, pl. 17.

It is declared, indeed, that no case can be found where the statute has been avoided, at law or in equity, unless on the ground of fraudulent concealment on the defendant's part. *Bishop v. Little*, 3 Greenl. (Me.), 405.

This subject was discussed by a truly great judge in the case of *Carr v. Hilton*, above mentioned, which was a suit in equity, by an assignee in bankruptcy, to recover of the defendant lands fraudulently conveyed to him by the bankrupt. The defendant relied on the statute of limitations contained in the bankrupt act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, Curtis, J., says: "Statutes of limitation do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, is a fraudulent concealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point.

As to what amounts to a discovery within the meaning of the equity rule: This is regarded as so important that it must, with all necessary circumstances, be distinctly stated in the bill. Grier, J., speaking of this point when delivering the opinion of the supreme court, says: "Especially must there be a dis-

tinct allegation as to the time when the fraud was discovered, and what the discovery is, so that the court may see whether, by the exercise of ordinary diligence, it might not have been before made." *Carr v. Hilton*, 1 Curt., 390; *Fisher v. Boody*, id., 206; *Moore v. Green*, 2 id., 202, 206; S. C., 19 How., 69. And the bill, it has even been said, should negative laches in not making the discovery. *Mayne v. Griswold*, 3 Sandf., 463; *Field v. Wilson*, 6 B. Mon., 479.

§ 410. — *discovery of the fraud defined to mean notice of the facts constituting the fraud.*

The question recurs, however, *What is discovery?* I answer, *notice of the fraud*; or, in the language of the Missouri statute, of "the facts constituting the fraud." What is notice? In answering this, Judge Curtis, in *Carr v. Hilton*, 1 Curtis, 390, 393, quotes and approves the following doctrine laid down in *Kennedy v. Green*, 3 Mylne & Keen, 719, 721, 722: "It is a well established principle that whatever is notice enough to excite attention and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The cases quite generally hold that the statute will run and fraud will not avoid it, if the plaintiff, under all the circumstances, has been guilty of negligence in discovering or attacking it. *Smith v. Talbot*, 18 Texas, 774; *McDonald v. McGuire*, 8 id., 361, 370; *Campbell v. Vining*, 25 Ill., 525; *Ferris v. Henderson*, 12 Penn. St., 49; *Johnson v. Johnson*, 5 Ala. (N. S.), 90; *Bucknor v. Calcote*, 28 Miss., 432; *Edmonds v. Goodwin*, 28 Geo., 38; *Lott v. De Graffenreid*, 10 Rich. (Eq.), 348; *Farnum v. Brooks*, 9 Pick., 212; *Way v. Cutting*, 20 N. H., 187; *Stearns v. Paige*, 7 How., 819, 829; *Edwards v. Gibbs*, 31 Miss.; *Angell on Lim.*, sec. 183, and note, sec. 190; *Nudd v. Hamblin*, 8 Allen (Mass.), 130, and cases cited.

It is easy, it seems to me, to press this principle too far, and I prefer the test or doctrine approved and applied by Judge Curtis, *i. e.*, holding the plaintiff to know all that the information he is possessed of makes it his duty, as a reasonable man, ordinarily vigilant in protecting his own interests, to know or to learn. The language of the statute is, "discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." This is the same, in my opinion, as if it read discovery of the fraud. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know "the facts" which make that transfer fraudulent.

In *Godbalt v. Lambert*, 8 Rich. Eq., 155, 164, where an alleged fraudulent deed was placed on record, and it was contended that creditors were bound to know its character, the chancellor very sensibly observed, "registry of a deed is only implied notice of its contents, and not of any fraud that may be perpetrated in its execution." I cannot assent to the correctness of the remark in the case of *Lott v. De Graffenreid*, 10 id., 346, that the registry of a deed is sufficient notice to creditors, and the statute of limitations begins to run from that period, even though the deed be fraudulent.

§ 411. — *by the Missouri statute of limitations a discovery of the fraud must be made within ten years.*

There is one peculiarity of the Missouri statute which ought not to be passed without notice, and that is the clause which renders it necessary to make the discovery of the fraud within ten years. The language of the section was evidently copied from the New York code, which is literally the same as the

Missouri statute, except that in New York the words "at any time within ten years" are omitted. Howard's N. Y. code, sec. 91. The same words are omitted likewise from the Ohio code, the Nebraska code (St., 1857, p. 395), the Kansas code (St., 1868, p. 633), the Minnesota code (St., 1866, p. 451), and the Iowa code (Rev., 1860, sec. 2741). All these statutes enact that in actions for relief on the ground of fraud, "the cause of action shall not be deemed to accrue until the discovery of the fraud," or of the "facts constituting the fraud." Words limiting the time when the discovery shall be made are, so far as I have observed, peculiar to the legislation of Missouri.

Lord Erskine, in one case, declared that "no length of time can prevent the unkenning of a fraud." Forrester, 66. Lord Northington said, with emphasis, in *Alden v. Gregory*, 2 Eden, 285, "Never, while I sit here, will delay purge a fraud." These expressions of decisive indignation against fraud are natural enough indeed, but if taken literally they lay down a doctrine which, if fully carried out, would be at war with the peace and repose of society, on which rests the wise policy of all limitation statutes. Hence the provision very generally adopted in the legislation of the states that the statute will begin to run from the period when the fraud is discovered, and hence, also, the additional provision of the Missouri statute, which seems to require the discovery to be made within ten years from the consummation of the fraud. The effect of this provision is, not to declare that the plaintiff cannot for a period of ten years be guilty of laches, or that he may for full ten years shut his eyes to facts which it would otherwise be his duty to notice and act upon, but its effect, rather, is to require him, at his peril, to make the discovery within the prescribed period. I do not doubt that the provision is wise in conception, and will prove salutary in operation.

The reason or ground in this rule in equity is quite plain. Applying, as this rule does, only to cases of secret or concealed, as distinguished from known, fraud, as before explained, I have no doubt that Lord Redesdale gives the true reason for its adoption by equity, viz.: that it is against conscience for a party to avail himself of the statute when by his own fraud he has prevented the other party from knowing or asserting his rights within the period prescribed by the statutes of limitation. 2 Sch. & Lef., 634; *Troup v. Smith*, 20 John., 33, 47, 48.

This is entirely consistent with the exposition of the rationale of the doctrine by Baron Alderson in *Brookshank v. Smith*, 2 Young & Coll., 68: "In cases of fraud, courts of equity hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this courts of equity differ from courts of law, which are absolutely bound by the words of the statute." *Imp. Gas, etc., Co. v. London Gas Light Co.*, 26 Eng. Law and Eq., 425. So in cases under the Missouri statute: the limitation begins to run as against the plaintiff when he has knowledge of facts which would have impressed a reasonable man with the belief that the transaction was fraudulent, for from that time his laches begins, if his debt is mature.

Judge Curtis, in the case before cited, speaking of the ground of the rule that fraud voids the statute, says: "In my judgment the most reasonable and sensible ground is that, substantially, the title to avoid it does not arise until the fraud is known." 1 Curt., 200. This is adopting the view of Lord Talbot (*Cas. t. Talbot*, 63), and it has also the sanction of eminent judges.

The title to avoid the fraudulent transaction does ordinarily arise as soon as

the fraud is perpetrated (26 Eng. Law and Eq., 425; J. J. Marsh., 445; 33 Miss., 233; 20 Johns., 33, *supra*); but *substantially* it does not, because the fraud is not known, and hence the fraudulent wrong-doer is estopped, while the aggrieved party is kept ignorant of his rights, from setting up against him the bar of the statute. But this assumes that the creditor's debt is one which is due, so that he is in law enabled effectively to assert his rights, and therefore properly chargeable with negligence if he fails, for the prescribed period, to do so. There may be some question as to the scope of the language of the statute, "an action for relief on the ground of fraud;" but there is no doubt that a bill in equity by a creditor to set aside a fraudulent conveyance or transfer of property by his debtor is such an action. The cases before cited will show that this point has never been disputed.

Having thus seen that the present suit is one which falls within the aforementioned tenth section of the limitation act; that the fraud contemplated by that act is fraud which is secret or concealed, as distinguished from that which is open and known; and having also seen what, in the view of a court of equity, is regarded as a discovery of the fraud, so that thenceforth the laches of the plaintiff and the running of the statute alike begin; that the ten years' limitation in the section is not to be construed as sanctioning negligence or the shutting of eyes to information of the fraud; and having also seen the reason or policy and purpose of this legislation, we are now prepared to apply the statute as thus expounded to the facts of the present cause. This, in view of the length of this opinion already, we must do briefly.

The facts constituting fraud in the transfer of property by a debtor are in some cases concealed or secret, and in some visible or open. The fraud in the sale of the stock of goods to Smith, in February, 1861, in view of the relationship of the parties, of facts known to a great many creditors as to Woodward's condition, and Smith's knowledge of it, and the manner in which Woodward was still allowed to exercise control over the property, was such, in our judgment, that any creditor might, if ordinarily vigilant, have discovered it within five years from its sale.

If the present was a bill simply to have declared fraudulent the sale made in 1861, we should have to hold, taking all the circumstances together, that the fraud was not so concealed or secret but the creditors, using due diligence, might and should have discovered it, and if their debts were due, could and should have assailed it within five years. Undoubtedly, it was this view of the case which was taken in the court below.

But, as we have before shown, such is not the case made by the bill, and such is not the relief sought. The question before the court is, whether, upon proofs, Woodward has any interest in the limited partnership carried on in the name of the respondent, Gray; whether Smith or Woodward is the party really owning the interest other than that owned by Gray.

Upon this subject we entertain a very decided conviction, and that is, that Smith has no real and substantial interest therein; has apparently no money invested in it beyond what he has received; that his pretense of ownership is purely sham, a device to keep at bay the creditors of Woodward; and that the latter, though held out simply to be a clerk, is the owner of the interest in the firm, other than that held by Gray. Since 1861, Woodward has, in effect, been managing the store the same as before, giving to it his time, attention and skill; to these, and the profits which are their product, his creditors, and not Smith, are best entitled.

Equity looks at substance and not form. It penetrates beyond externals to the substance of things, and it accounts as nothing, and delights to burst away, barricades of written articles and formal documents when satisfied that they have been devised to conceal or protect fraud.

The fraud in the case before us, as we view it, ended not with the purchase of the goods in 1861, but continued down to the time this bill was filed. The case is different from what it would be if the sale of the goods had been the only transaction, and Smith had taken exclusive possession of them, and held or sold them as his own, more than five years before his purchase was attacked by creditors of his vendor.

It is our opinion that the fraud commenced in 1861 has been continued down to the time this suit was brought; that in equity, as respects creditors, the interest in the firm and its business is owned by Woodward and not by Smith; that the latter holds that interest, whatever that may be, in secret trust for the former, and hence the statute of limitations cannot avail to prevent that interest from being ascertained and subjected to claims of creditors of the bankrupt.

It is not necessary in this view to consider the point made, that at all events the statute could not bar the relief sought, at least not entirely, because the debts of some of the creditors of Woodward did not fall due until 1867.

We now decide two points only: First, that Woodward has an interest in the property and assets of the firm business carried on in the name of Gray, which may be reached by the assignee in the present suit. Second, that the statute of limitation, pleaded by the respondent Smith, is no bar to the relief sought. The decree of the district court is reversed.

KREKEL, J., concurred.

§ 412. General principles.—The rule that equity will not enforce a stale claim should never be applied in cases of trust where the means of knowledge are wholly or chiefly on one side. And when fraud, consisting of concealments and misrepresentations, is charged and proved, courts of equity are reluctant to apply this rule, unless the rights of innocent third parties will be injuriously affected if the defense is overruled. *James v. Atlantic Delaine Co.*, 3 Cliff., 614.

§ 413. In cases of concealed fraud the rule is that what amounts to laches or undue delay in bringing suit after discovery of the fraud depends upon the facts of each particular case. *Forbes v. Overby*, 4 Hughes, 441.

§ 414. The statute of limitations of California held to begin to run from the time the fraud complained of was publicly known though unknown to complainants. *Case of Broderick's Will*, 21 Wall., 503.

§ 415. In cases of fraud the cause of action does not accrue until the discovery of the fraud. *Van Bokkelen v. Cook*, 5 Saw., 592; *Mason v. Crosby*, Dav., 303.

§ 416. On bill to set aside a decree on the ground of fraud, limitation runs from the discovery of the fraud. *Clark v. Hackett*, 1 Cliff., 269.

§ 417. To avoid the statute of limitations, ignorance of the fraud must be alleged, and also when and how it was first discovered. *Carr v. Hilton*, 1 Curt., 390.

§ 418. Wisconsin statute. Action that must be brought within six years after discovery of fraud. *Sheldon v. Keokuk Northern Line Packet Co.*, 8 Fed. R., 773.

§ 419. Lapse of time bars an action to rescind a sale on account of the fraud of the agent. *Veazie v. Williams*, 3 Story, 611.

§ 420. Where fraud is charged by a complainant, and it appears that she had at the time knowledge of facts sufficient to put her upon inquiry, she cannot be heard to charge such fraud and seek to escape its results eleven years after its perpetration. *Amory v. Amory*, 6 Biss., 174.

§ 421. The statute of limitations of two years is not good against a married woman bringing suit within two years after discovery of fraud. *Ex parte Anderson*, 2 Hughes, 391.

§ 422. The statute of limitations never runs against a fraud, and no length of time will bar relief where it can be established. *Baker v. Whiting*, 3 Sumn., 486.

§ 423. A right to relief on the ground of fraud is barred after eight years after knowledge

of the fraud is acquired, both in equity and by the statute of limitations of Florida. *Coddington v. Railroad Co.*,* 13 Otto, 409.

§ 424. Illustrations of the rule.—A court of equity will grant relief against a judgment obtained by fraud, but the relief will be refused where the complainant, by the use of proper care and diligence, could have defeated the action at law; whether the time the negligence has subsisted is sufficient to give rise to laches is a question to be solved by the sound discretion of the court. Thus where a judgment was obtained by the fraudulent collusion of certain county officers against the county in October, 1865, and the bill to set aside the judgment was not filed until the latter part of 1872, it was held that equity would refuse relief. *Brown v. County of Buena Vista*,* 5 Otto, 157.

§ 425. John O. Page, the complainant's intestate, was a merchant in Maine. He built and owned shares in vessels employed in trade, and had a retail shop which, for many years before his death, was managed by his brother, Rufus K. Page. In 1810 John went to England, where he died early in 1811, leaving a widow and three minor children. Letters of administration were issued to the widow. In 1812 an arbitrator was chosen by her, aided by her father and brother-in-law, and Rufus, to settle all accounts between the estate and Rufus. The widow settled the final account of her administration in 1816 and died in 1824. In 1828 Stearns, the complainant, married one of the daughters of John. In 1834 he took out letters of administration *de bonis non* on John's estate, and in 1838 he filed a bill against Rufus for a discovery and account on the ground of fraud, which was amended in 1841. It was held that as the complainant had discovered no fact of which the widow was ignorant, and could specify no misrepresentation, concealment or fraud practiced by defendant, which had for the first time come to light, and did not state what property was not accounted for by the widow or how she was deceived or defrauded by Rufus, and as it appeared that the suspicions of fraud were the result of ignorance of facts of which the widow and her counsel must have been fully conversant, the delay in filing the bill was such as to bar relief in equity. *Stearns v. Page*,* 7 How., 819.

§ 426. In order to avoid the bar of the statute of limitations, the grounds of avoidance must be shown in the bill, and in case of fraud it must state when and how the alleged fraud was committed, and must be supported by the evidence. The bill must be filed within twenty years after the discovery of the fraud. So held in a suit in equity to recover certain lands in Rhode Island on the ground of fraud. The bill stated that John Newton died in 1767, leaving certain daughters and grandchildren as his heirs; that the husbands of the daughters conspired to defraud the grandchildren of their shares, and, by fraudulent means, acquired the title to the lands. The defendants denied the fraud and relied on eighty years' possession as a bar. The complainant knew of an action brought in 1797, seeking to recover other lands for the same cause and had aided in making inquiries leading thereto. *Moore v. Green*,* 2 Curt., 203. Affirmed, 19 How., 69.

§ 427. The United States courts are not bound to follow, as rules of decision in equity cases, the statutes of limitations of the several states or the construction given to them by the state judiciary; and in cases where they do so by analogy, they do so because equity requires it, and the statutes are found to be in harmony with its general principles; the statute does not run in favor of one who perpetrates a fraud while he conceals it from the party injured. Thus where the statute of limitations of Missouri barred claims against the estates of decedents if not presented within two years, the court refused to follow it where there had been a fraudulent concealment of the cause of action by the deceased and the fraud was not discovered until seven years after his decease. *Johnston v. Roe*, 1 McC., 162.

§ 428. Ignorance of the existence of a cause of action, resulting from the fraudulent concealment of the fact by the defrauding party, will remove the bar of the statute. So held in an action on the case for a deceitful representation in a sale where the statute of limitations was pleaded in bar. The plaintiff replied that there was a fraudulent concealment of the deceit until within six years. This replication was held good. *Sherwood v. Sutton*,* 5 Mason, 148.

§ 429. Laches and the statute of limitations cannot be set up when suit was brought within a reasonable time after the discovery of a secret fraud. *Meador v. Norton*, 11 Wall., 442.

§ 430. Where a sale took place January 1, 1836, at which the price was enhanced to the injury of the purchaser by the fraud of the auctioneer by by-bidding and puffing, and the fraud was not discovered until 1840, and a bill for relief was filed in 1841, it was held that the lapse of time was not a sufficient objection to the relief. *Veazie v. Williams*, 8 How., 134.

§ 431. It is no bar to the recovery that the suit for the rescission of the sale of land was instituted two years after the purchase and little more than one year after the discovery of the fraud. *Smith v. Babcock*, 2 Woodb. & M., 246.

§ 432. Railroad stock was subscribed by private individuals with a proviso that, if a certain municipal corporation subscribed a certain amount, it should accept their subscriptions over

and above \$300 each. By resolution passed by the board of directors, these original subscriptions over that amount were transferred and merged in the subscription of the municipal corporation. In 1857, four years after this arrangement had been made, a judgment was recovered against the railroad company, and the return of *nulla bona* to the execution was made in 1858, the company being insolvent. Upon bill filed in 1868 to compel the original subscribers to pay up the amount of their subscriptions in excess of \$300, the court inclined to the opinion that, as the articles of association were on record and open to inspection as well as the books of the company, showing that the subscribers had only paid for six shares, etc., there was sufficient to have put the complainants upon inquiry as to the fraud, if any there was, and that such being the case, and the complainants having remained quiescent during a period longer than that fixed by the state statute of limitations, equity could not set aside the fraudulent transaction. *Burke v. Smith*, 16 Wall., 390.

§ 433. If a complainant would avoid the effect of lapse of time, or the statute of limitations, on the ground of concealed fraud, he must set forth with particularity when and by what means the fraud was discovered, and the averment so made must be supported by the proofs. Accordingly, where the complainant alleged that fraudulent acts and doings had been committed more than thirty years previous to the date of bringing the suit, and that such fraudulent acts were unknown to him "until within five years last past," but did not allege that the same had been concealed from him, or when or by what means the fraud had been discovered, *held*, that such general and unsubstantial allegations of excuse could not be regarded by a court of equity as sufficient. *Badger v. Badger*, 2 Cliff., 137.

§ 434. A bankrupt transferred property in fraud of the bankruptcy act, the fact of such transfer being concealed from the assignee in bankruptcy until within three months before suit brought by such assignee for the recovery of such property. *Held*, that by reason of the concealment, the two years' statute of limitations in section 2 of the bankruptcy act of March 2, 1867 (14 Stat. at Large, 534, 536), was not a bar to the action, although it had not been brought within two years after the assignment in bankruptcy to such assignee. *Tyler v. Angevine*, 15 Blatch., 536.

§ 435. Where a sale of certain timber lands was made in 1835, and the present bill was brought in 1841 to set it aside for mistake and fraud, and it appeared that false statements had been made by the seller, going to the essence of the bargain, on which the buyer had relied, and that the fraud had not before come to the knowledge of the plaintiff, *held*, that the lapse of time was not, under the circumstances, a bar to the suit. *Doggett v. Emerson*, 3 Story, 700.

§ 436. To an action for deceit in the sale of a vessel the six years' statute of limitations was pleaded. Upon issue joined as to the plea, *held*, that the real question was whether the fraud upon the plaintiff alleged in the declaration was concealed by the defendant so that it never came to the knowledge of the plaintiff until within six years before the commencement of the suit. *Sherwood v. Sutton*, 5 Mason, 1.

§ 437. On bill brought by a county to set aside a judgment charged to have been fraudulently procured on county warrants fraudulently issued, *held*, that discovery of the fraud, within the meaning of the statute of limitations, could not be imputed to the county from the moment the fraud was perpetrated, simply because it was known to the officer who committed it. *O'Brien County v. Brown*, 1 Dill., 588.

4. Mistake.

SUMMARY — Misrepresentations; boundaries, § 438.

§ 438. Equity will give relief against an agreement entered into by mistake produced by the representations of the other party to it. So held in an action to set aside an agreement fixing the boundary between the states of Rhode Island and Massachusetts, to which the former agreed by reason of trust in certain misrepresentations made by the delegates of the latter, which was not discovered until 1740. Reasons preventing the operation of the rules of limitation or prescription in such case. *Rhode Island v. Massachusetts*, §§ 439-41.

[NOTES.— See §§ 442, 443.]

STATE OF RHODE ISLAND v. COMMONWEALTH OF MASSACHUSETTS.

(15 Peters, 233-274. 1841.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— The attention of the court has on several occasions been drawn to this case by the important questions which have arisen in dif-

ferent stages of the proceedings. At the last term it came before us upon a plea in bar to the complainant's bill, which upon the motion of the complainant had been set down for argument.

This part of the case is reported in 14 Pet., 210, where the allegations contained in the bill are so fully set out that it is unnecessary to repeat them here. The court having overruled the plea for the reasons stated in the report of the case, the defendant has since demurred; and in this state of the pleadings the question is directly presented, whether the case stated by Rhode Island in her bill, admitting it to be true as there stated, entitles her to relief.

The character of the case and of the parties has made it the duty of the court to examine very carefully the different questions which from time to time have arisen in these proceedings. And if those which are brought up by the demurrer were new to the court, or if the judgment now to be pronounced would seriously influence the ultimate decision, we should deem it proper to hold the subject under advisement until the next term, for the purpose of giving to it a more deliberate examination.

But although the questions now before the court did not arise upon the plea, and of course were not then decided, yet much of the argument on that occasion turned upon principles which are involved in the case as it now stands. The facts stated in the bill were brought before us, and the grounds upon which the complainant claimed relief were necessarily discussed in the argument at the bar, and the attention of the court strongly drawn to the subject. The whole case, as presented by the bill and demurrer, has been again fully and ably argued at the present term; and as the court has made up its opinion, and are satisfied that the delay of our judgment to the next term would not enable us to obtain more or better light upon the subject, it would be useless to postpone the decision.

The demurrer admits the truth of the facts alleged in the bill, and it is sufficient for the purposes of this opinion to state in a few words the material allegations contained in it.

1. It alleges that the true boundary line between Massachusetts and Rhode Island, by virtue of their charters from the English crown, is a line run east and west three miles south of Charles river, or any or every part thereof; and sets out the charters, which support in this respect the averments in the bill.

2. That Massachusetts holds possession to a line seven miles south of Charles river, which does not run east and west, but runs south of a west course; and that the territory between this line and the true one above mentioned belongs to Rhode Island, and that the defendant unjustly withholds it from her.

3. That Massachusetts obtained possession of this territory under certain agreements and proceedings of commissioners appointed by the two colonies, which are set out at large in the bill; and the complainant avers that the commissioners on the part of Rhode Island agreed to this line under the mistaken belief that it was only three miles south of Charles river; and that they were led into this mistake by the representations made to them by the commissioners on the part of Massachusetts, upon whose statement they relied.

4. That this agreement of the commissioners was never ratified by either of the colonies; and the bill sets out the various proceedings of the commissioners and legislatures of the two colonies, which, if not sufficient to establish the correctness of the averment, are yet not incompatible with it.

5. The bill further states that the mistake was not discovered by Rhode Island until 1740, when she soon afterwards took measures to correct it; that

she never acquiesced in the possession of Massachusetts after the mistake was discovered, but has ever since continually resisted it, and never admitted any line as the true boundary between them but the one called for by the charters. Various proceedings are set out and facts stated in the bill to show that the complainant never acquiesced, and to account for the delay in prosecuting her claim. Whether they are sufficient or not for that purpose is not now in question. They are certainly consistent with the averment and tend to support it.

§ 439. *A bill alleging that the boundary between two provinces was fixed by mistake held to make out a case for relief in equity.*

The case, then, as made by the bill, and to be now taken as true, is substantially this: The charter boundary between these colonies was three miles south of Charles river; and the parties intending to mark a line in that place marked it by mistake four miles further south, encroaching so much on the territory of Rhode Island, and the complainant was led into this mistake by confiding in the representations of the commissioners of the defendant. And as soon as the error was discovered she made claim to the true line and has ever since contended for it.

We speak of the case as it appears upon the pleadings. It may prove to be a very different one, hereafter, when the evidence on both sides is produced. But taking it as it now stands, if it were a dispute between two individuals, in relation to one of the ordinary subjects of private contract, and there had been no laches to deprive the party of his title to relief, would a court of equity compel him to abide by a contract entered into under such circumstances? It is one of the most familiar duties of the chancery court to relieve against mistake, especially when it has been produced by the representations of the adverse party. In this case, the fact mistaken was the very foundation of the agreement. There was no intention on either side to transfer territory, nor any consideration given by the one to the other to obtain it. Nor was there any dispute arising out of conflicting grants of the crown, or upon the construction of their charters, which they proposed to settle by compromise. Each party agreed that the boundary was three miles south of Charles river; and the only object was to ascertain and mark that point; and upon the case as it comes before us, the complaint avers, and the defendant admits, that the place marked was seven miles south of the river, instead of three, and was fixed on by mistake; and that the commissioners of Rhode Island were led into the error by confiding in the representations of the Massachusetts commissioners. Now, if this mistake had been discovered a few days after the agreements were made, and Rhode Island had immediately gone before a tribunal having competent jurisdiction, upon principles of equity, to relieve against a mistake committed by such parties, can there be any doubt that the agreement would have been set aside, and Rhode Island restored to the true charter line? We think not. Agreements thus obtained cannot deprive the complainant of territory which belonged to her before, unless she has forfeited her title to relief by acquiescence or unreasonable delay.

§ 440. *Boundaries between sovereignties; mistake; laches; acquiescence.*

But it has been argued on the part of the defendant that assuming the agreement to have been made by mistake, and that the complainant would have been entitled to set it aside if she had prosecuted her claim within a reasonable time, yet, as Massachusetts entered into the disputed territory immediately after the agreement, and has held it ever since, the complainant

too late in seeking relief; that, after such a lapse of time, she is barred by prescription, or must be presumed to have acquiesced in the boundary agreed upon; and that, if she did not acquiesce, she has been guilty of such laches and negligence in prosecuting her claim that she is no longer entitled to the countenance of a court of chancery.

The answer to this argument is a very plain one. The complainant avers that she never acquiesced in the boundary claimed by the defendant, but has continually resisted it since she discovered the mistake; and that she has been prevented from prosecuting her claim at an earlier day by the circumstances mentioned in her bill. These averments and allegations in the present state of the pleadings must be taken as true; and it is not necessary to decide now, whether they are sufficient to excuse the delay. But when it is admitted by the demurrer that she never acquiesced, and has from time to time made efforts to regain the territory by negotiations with Massachusetts, and was prevented by the circumstances she mentions from appealing to the proper tribunal to grant her redress, we cannot undertake to say that the possession of Massachusetts has been such as to give her a title by prescription, or that the laches and negligence of Rhode Island have been such as to forfeit her right to the interposition of a court of equity.

§ 441. *Rule of limitation between sovereigntics. Statute may be taken advantage of on demurrer.*

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a court of equity. And when the fact appears on the face of the bill, and no circumstances are stated which take the case out of the operation of the act, the defendant may undoubtedly take advantage of it by demurrer, and is not bound to plead or answer. The time necessary to operate as a bar in equity is fixed at twenty years, by analogy to the statute of limitations; and the rule is stated in Story's Commentaries on Equity Pleading, 339, and is supported and illustrated by many authorities cited in the notes. It was recognized in this court in the case of *Elmendorf v. Taylor*, 10 Wheat., 168-175 (§§ 740-44, *infra*). But it would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; and the boundary in question was in a wild, unsettled country, and the error not likely to be discovered until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve after the mistake was discovered, was on the other side of the Atlantic, and was not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations make it equally evident that a possession so obtained, and held by Massachusetts under such circumstances, cannot give a title by prescription.

The demurrer, therefore, must be overruled. But the question upon the agreements, as well as that upon the lapse of time, may assume a very different aspect if the defendant answers and denies the mistake and relies upon the lapse of time as evidence of acquiescence, or of such negligence and laches as will deprive the party of his right to the aid of a court of equity. It will then be open to him to show that there was no mistake; that the line agreed on is the true charter line; or that such must be presumed to have been the construction given to the charters by the commissioners of both colonies, or that

the agreement was the compromise of a disputed boundary, upon which each party must be supposed to have had equal means of knowledge.

So, too, in relation to the facts stated in the bill to account for the delay. It will be in the power of the complainant to show, if she can, that her long-continued ignorance of an error (which, if it be one, was palpable and open) was occasioned by the wild and unsettled state of the country, and that the subsequent delay was produced by circumstances sufficiently cogent to justify it upon principles of justice and equity, or was assented to by Massachusetts, or occasioned by her conduct. And, on the other hand, it will be the right of the defendant to show, if she can, that Rhode Island would not have been ignorant of the true position of this line until 1740; or, if she remained in ignorance until that time, that it must have arisen from such negligence and inattention to her rights as would render it inexcusable, and should be treated, therefore, as if it had been acquiescence with knowledge; or she may show that, after the mistake is admitted to have been discovered, Rhode Island was guilty of laches in not prosecuting her rights in the proper forum, and that the excuses offered for the delay are altogether unfounded or insufficient; and that Massachusetts never assented to it nor occasioned it.

We state these questions as points that will remain open upon the final hearing, for the purpose of showing that the real merits of the controversy could not have been finally disposed of upon the present pleadings, but without meaning to say that other questions may not be made by the parties, if they shall suppose them to arise upon the proceedings hereafter to be had. The points above suggested, which are excluded by the case as it now stands, make it evident that this controversy ought to be more fully before the court, upon the answer, and the proofs to be offered on both sides, before it is finally disposed of.

The court will, therefore, order and decree that the demurrer be overruled; and that the defendant answer the complainant's bill on or before the 1st day of August next.

§ 442. Petitioner's mistake in believing his rights were probably destroyed, together with other facts, in equity prevents the bar of limitation. *Russell v. Southard*, 12 How., 139.

§ 443. Even if a mistake were proved, it would be difficult to disturb a possession of two centuries by a state under an assertion of right, with the claim admitted by the other state and colonies in the most solemn form. So held in an action to set aside a convention between Massachusetts and Rhode Island as to the boundaries between them, finally entered into in 1718, on the ground of mistake. *Rhode Island v. Massachusetts*, 4 How., 591.

5. *Mortgages.*

SUMMARY — Note barred, § 444.

§ 444. The fact that the statute of limitations bars an action on a promissory note in a court of law does not affect the right of the holder to enforce a lien in equity created by a mortgage given as security for the note. So held in a case where a bill was filed to foreclose a mortgage, to which a demurrer was filed on the ground that the mortgage was given to secure the payment of a promissory note, an action on which was barred by the statute of limitations. *Sparks v. Pico*, §§ 445-46.

[NOTES.— See §§ 447-469.]

SPARKS v. PICO.

(Circuit Court for California: 1 McAllister, 497-504. 1859.)

Bill to foreclose a mortgage. Demurrer, on the ground that the note which the mortgage was made to secure is barred by the statute of limitations.

Opinion by McALLISTER, J.

The question arising out of these pleadings is, whether the fact that the promissory note cannot be sued on (by reason of being barred by the statute of limitations) estops complainant from enforcing in a court of equity his lien on the mortgaged property.

§ 445. *The California statute of limitations bars the action, but does not extinguish the debt.*

In the case of *Fairbanks v. Dawson*, 9 Cal., 89, the supreme court of this state have said, speaking of the English statute of limitations and that of this state, that there may be a little difference in their language, but "their substance and meaning are the same." In the English statute the language is, "no action shall be maintained," etc. That of the California statute is, "no action shall be commenced," etc. Both statutes alike bar the remedy; neither renders void or extinguishes the debt or cause of action.

Two early cases in England, that of *Draper v. Glassop*, 1 Ld. Raym., 153, and an anonymous case in *Salkeld*, 278, decided that the statute of limitations destroyed the *debt* as well as the *remedy*; but Parsons, in a note to his treatise on Contracts, says of those two cases, "These decisions have now no authority;" and he refers to several more recent authorities, beginning with Lord Mansfield. He further says in his treatise on Mercantile Law (250), "It is important to remember that the statute of limitations does not avoid or cancel the debt; but only provides that no action shall be maintained upon it after a given time." "But it does not follow that no right can be sustained by the debt, although the debt cannot be sued. Thus if one who holds a common note of hand on which there is a mortgage or pledge of real or personal property, without valid excuse neglects to sue the note for more than six years, he can never bring an action upon it; but his pledge or mortgage is as valid and effectual as it was before, and as far as it goes his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage for instance, he may use whatever process is necessary on the note itself."

§ 446. *Although by reason of the bar of the statute of limitations no action can be sustained on a note, a court of equity will enforce a lien for its payment created by a mortgage made to secure it.*

With a single exception I can find no case, unless decided under a statute, which sustains the proposition that the deprivation of a right to sue on a promissory note to recover its contents annuls the right of the holder of that note, if he also holds a mortgage in which the title to real estate was conveyed to him as security, to enforce his lien on that property in a court of equity. The solitary case to which allusion has been made as the only one which is direct upon the point which has come to the notice of this court and sustains an adverse doctrine is that of *Duty v. Graham*, 12 Tex., 427.

The policy of the state of Texas, which seems to control the judiciary of that state, is apparent by reference to the case of *Union Bank of Louisiana v. Stafford*, 12 How., 340. In this last case the supreme court say: "However much it may be the policy of Texas (as it is alleged in the case of *Love v. Dock*, and *Snodley v. Cage*, lately decided in the supreme court of that state) to give a liberal construction to their statute of limitations in favor of debtors for the purpose of encouraging immigration, it is abundantly apparent that these sections (of the limitation law) can have no application to a bill in equity to enforce the sale of mortgaged property, whether the slaves in question be considered either as personalty or realty."

The principle enunciated in that case, 12 Howard, 328, is, that the Texas statute of limitations of actions upon contracts, or for the detention of personal property, has no application to a bill in equity to foreclose a mortgage. Equity does not allow the mortgagor to set up his possession as adverse to the mortgagee.

"In cases [say the court] of concurrent jurisdiction, courts of equity are said to act in obedience of the statute of limitations, and in other cases to act upon the analogy of the limitations of law. A bill to foreclose a mortgage and enforce the sale of mortgaged property has no analogy to an action of *trover*, *detinue* or trespass. The claim of the mortgagee is a "*jus ad rem*, not a *jus in re*." He does not claim as owner of the property. The possession of the mortgagor is not adverse but under the mortgagee."

Hughes v. Edwards, 9 Wheat., 489 (Conv., §§ 919-25), was a case on the equity side of the court, in which a decree of foreclosure of mortgage was rendered. That the legal cause of action in that case had been barred by the statute of limitations is inferable from the observations of Washington, J., who delivered the opinion of the court. He says: "But the use he (the appellant's counsel) endeavors to make of the objection was to turn the complainants out of a court of equity, and leave them to their legal remedy by ejectment to recover the possession of the granted premises, in which it was supposed they might be successfully encountered by the statute of limitations." *Ibid.*, 494. And it is proper to observe that in the case at bar the complainants, if left to their remedy at law, would be utterly remediless; for, by statute of this state, no action of ejectment can be brought for the recovery of premises conveyed by mortgage. But the supreme court of the United States in above case did not turn the complainants out of court, and in relation to the question of time say:

"Whether the defendant could avail himself (in the former case in the action at law) of the act of limitations, whilst the equitable remedy of the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a court of equity. The effect which length of time may have upon the plaintiff's rights in *that* court will be considered under another head." *Ibid.*, 494.

It is manifest then, from the two decisions of the supreme court to which reference has been made, that the statute of limitations of this state does not apply to this case, and that considerations in regard to the extent to which the rights of complainants are affected by the efflux of time are to be considered by those rules which control a court of chancery, apart from any estoppel supposed to arise out of the fact that a common-law remedy by action on the note has been barred by the statute of limitations.

And here this case might be left; but the principle asserted by the *demurrer* in this case—that a mortgagee is remediless on his mortgage, because his remedy on the note it was given to secure had been barred by the statute of limitations—is of so great practical importance, that a more minute consideration of the authorities is not inappropriate.

In the case of *Elkins v. Edwards*, 8 Geo., 325, it is expressly decided that where a mortgage is given to secure a note, and the remedy on the latter is barred by the statute of limitations, and the debt is unpaid, the creditor may avail of his lien and foreclose his mortgage. And the court gives as the reason for his ability to do so, that he (the creditor) stipulated by contract for two remedies against his debtor to enforce the collection of his demands. These

two remedies are totally distinct; the one by an action at law on the note, one of the written evidences of his debt; the other, by a bill in equity to procure a sale of the mortgaged property.

In *Eastman v. Foster*, 8 Metc., 19, it is decided that a mortgage to indemnify the mortgagee for his liability as surety upon a note of the mortgagor, creates a trust and equitable lien for the holder of the note, subject to which the mortgagee holds the land, though the note be barred by the statute of limitations, etc. The same principle is affirmed in *Crain v. Paine*, 4 Cush., 483. The court say: "It was argued by defendant's counsel that the note has been barred by the statute of limitations; but this clearly cannot defeat the plaintiff's title to the mortgage property, so as to bar the present action."

In *Joy v. Adams*, 26 Me., 330, it is said, "a mortgage security has not been deemed to be within any branch of the statute of limitations. He (the mortgagor) who would avoid such security must show payment." He has not been allowed to defeat the right of the mortgagee, by showing that the personal security, to which the mortgage security is collateral, has become barred by the statute of limitations.

A similar doctrine is affirmed in the case of *Thayer v. Mann*, 19 Pick., 535. The foregoing are the views of the text-writers, Parsons, in his Treatises on Contracts and Mercantile Law, the several English decisions referred to in his note, five American state decisions, and two cases from the supreme court of the United States. Opposed to this mass of authority is the solitary case of *Duty v. Graham*, 12 Tex., 427. After settling, satisfactorily to itself, that a mortgage is mere security for a debt; that the mortgagor remains the owner of the land, entitled to the possession of it, and the mortgagee cannot maintain trespass to try title to it,—the inference is drawn by the court, contrary to all the foregoing authorities, that where the note, secured by a mortgage, is barred by the statute of limitations, the effect of the statute is not only to prevent a recovery on the note, but destroys the original debt, and all additional evidences in the possession of the creditor; and this all the result of implication.

Let us look to the reason of this, so far as this case is concerned. When the creditor advanced his money, he entered into two contracts. By one, he took the personal pledge of the borrower. Not content with this, he required and the borrower agreed, the one to receive and the other to deliver, a solemn, written instrument, under seal, in which the borrower acknowledges the execution and delivery of his written promissory note, and at that time that he is justly indebted to the complainant in the sum of \$2,000. The condition annexed to this document is, that if defendant shall *pay*, or shall cause to be *paid*, the sum of \$2,000, with all interest due, according to the tenor of a promissory note specially referred to, the mortgage should be void; otherwise to remain in full force and effect. No portion of the \$2,000 has been paid and the mortgage is still in force by its very terms.

In *Thayer v. Mann*, 19 Pick., 535, 537, the court say: "A reference to the condition contained in the mortgage shows that it is to be and remain in full force until the debt shall be paid.

"The debt remains, although the statute may discharge the remedy on the note." 2 Hilliard on Mortgages, 25. The debt is the money due. If the only evidence of its existence is a promissory note, and that is barred by the statute of limitations, the plaintiff is remediless. But if he has secured a lien on property as security, and additional evidence of the debt, he has

the right to make it available by a resort to equity. If, pursuing that course, the absence of the note unaccounted for or other circumstances raise the presumption of payment of the debt, he must necessarily fail. In this case, the non-payment of any part of the debt is an admitted fact. Whenever the complainant shall attempt to invoke a remedy of which he is deprived by the statute of limitations, he will be encountered by that act, and the question will then arise, in the language of the court in the case of *Hughes v. Edwards*, 9 Wheat., 494 (Conv., §§ 919-25): "Whether the defendant could avail himself of the act of limitations whilst the equitable remedy of the plaintiff is subsisting?" This question need not be decided in this case as the parties are now before a court of equity.

But there is a fatal defect in the form of the *demurrer* in this case which avoids it independently of all other objections. The ground assigned for the demurrer is that it appears from the bill that the promissory note to secure which the mortgage was given was made and executed by the defendant more than four years before the filing of the bill.

The statute of limitations does not run from the date of the note, but from the time the cause of action accrued. But as an argument was had on all the questions involved, and the court would have permitted an amendment of the demurrer, a decision upon the whole case has been made. An order overruling the demurrer must be entered.

§ 447. **Mortgages — In general.**—In Louisiana the civil code requires mortgages to be recorded every ten years in order to give constructive notice, but where an incumbrancer or purchaser has actual notice registry is unnecessary. It was held in a case of sale of lands under an execution that prescription of the mortgage did not begin to run until the debt secured had matured. *Patterson v. Dela Ronde*, 8 Wall., 292.

§ 448. Where a mortgagee, in 1820, caused a writ of *scire facias* to be issued out of a law court (there being no court of equity) and a regular judgment was not docketed, but a writ of *levari facias* was issued and the property sold to satisfy the mortgage, and in 1836 the record was amended by a court having jurisdiction, *held*, that the mortgagor and his heirs could not avail themselves of the defect after the property had been held adversely and quietly for a long time. *Slicer v. Bank of Pittsburg*, 16 How., 571.

§ 449. A mortgagor cannot redeem after a lapse of twenty years after forfeiture and possession by the mortgagee (which period has been adopted in equity by analogy to the statute of limitations), no interest having been paid in the meantime and no circumstances appearing to account for the neglect. *Hughes v. Edwards*, 9 Wheat., 489.

§ 450. The act of limitations of Georgia does not apply to mortgagees; the possession of a mortgagor is not adverse. *Higginson v. Mein*, 4 Cr., 415.

§ 451. The lapse of fifteen years bars a mortgagee's right to foreclose in Connecticut. *Fox v. Blossom*, 17 Blatch., 355.

§ 452. A claim to redeem a mortgage cannot be barred under twenty years. *Amory v. Lawrence*, 3 Cliff., 583.

§ 453. After twenty years' possession by the mortgagee the right to redeem will be presumed to have been abandoned. *Dexter v. Arnold*, 1 Sumn., 109.

§ 454. If the mortgagee holds by himself and those claiming under him for over twenty years without accounting, the mortgagor loses his right of redemption and the mortgagee's title becomes absolute. *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr., 569.

§ 455. Though a debt secured by mortgage is barred by limitations, but a suit as to the property is not so barred, the debt is protected by the mortgaged property and is not barred until suit for the same is also barred. *Almy v. Wilbur*, 2 Woodb. & M., 408.

§ 456. A second mortgagee can by suit have a first mortgage canceled if it has been barred by fifteen years' inaction. *Fox v. Blossom*, 17 Blatch., 355.

§ 457. Lapse of time raises no presumption that mortgage has been paid against a possessor under the mortgage. *Brobst v. Brock*, 10 Wall., 585.

§ 458. Lapse of time will not raise the presumption that the mortgage has been paid, if it is proved that proceedings had been instituted to foreclose it. *Kibbe v. Thompson*, 5 Biss., 226.

§ 459. The possession of the mortgagor is not adverse, but under the mortgagee, and the

former cannot remove or conceal the property and plead conversion and adverse possession against the latter. *Union Bank of Louisiana v. Stafford*, 12 How., 841.

§ 460. An action to reform and foreclose a mortgage is not barred in Minnesota under ten years. *Reeves v. Vinacke*, 1 McC., 213.

§ 461. A statute of limitations which cannot be pleaded against a note cannot be pleaded against a mortgage securing it. *Daggs v. Ewell*, 3 Woods, 844.

§ 462. A right to a specific performance is lost by laches if suit is delayed beyond the time which would bar a suit at law by the statute of limitations. *Preston v. Preston*, 5 Otto, 200.

§ 463. Where suit was commenced in 1823 to enforce the specific performance of a contract made in 1794, and both the original vendor and vendee were dead and the property had increased largely in value from general improvement and settlement, *held*, barred. *Holt v. Rogers*, 8 Pet., 420.

§ 464. Length of time is no bar to specific performance unless pleaded in the answer, the condition of the parties and subject-matter of the contract remaining the same. *Hunter v. Town of Marlboro*, 2 Woodb. & M., 199.

§ 465. The statute limiting suits in chancery to ten years should be applied to a suit to foreclose a mortgage against a purchaser under prior mortgages, brought seventeen years after the mortgage debt was payable, the mortgage having been given and the mortgage debt having become payable before the statute took effect, particularly when the mortgagee had notice, within two years after the sale under the prior mortgages, of such sale, and that the purchaser was in possession of the premises claiming title. *Insurance Co. v. Reed*,* 6 Am. L. Reg., 406.

§ 466. Without such a statute, equity would not disturb the possession or title of such a purchaser, as the demand is stale. There must be conscience, good faith, and reasonable diligence to call into action the powers of a court of equity. *Ibid*.

§ 467. Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the note to call for the execution of the trust, although the judgment might be barred by the statute of limitations. *Bank of the Metropolis v. Gutschlick*, 14 Pet., 19.

§ 468. Whether by analogy to the statutes of the state limiting the time for the redemption of lands sold for debt, a subsequent mortgagee, not a party to a bill of a prior mortgagee to foreclose, could maintain a bill in equity to redeem after two years, against a purchaser under a decree on the prior mortgage, *quære?* *Insurance Co. v. Reed*, 6 Am. L. Reg., 406.

§ 469. The presumption that an equity of redemption is released after twenty years' possession by a mortgagee does not apply to a case where the mortgagee was in possession under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient, no specific time being fixed, and the mortgagor had no notice or request to redeem; and if in such a case the mortgagee sells the land to a *bona fide* purchaser without notice, such sale becomes a constructive fraud on the rights of the mortgagor, and turns his right to redeem into a claim against the mortgagee personally, the limitation of which, in equity, is six years after the discovery of the fraud by the mortgagor. *Wyman v. Babcock*, 2 Curt., 886.

6. Trusts.

SUMMARY — Resulting trust, § 470.

§ 470. A resulting trust in lands is barred after the lapse of twenty-one years if the possession of the adverse claimant is notorious and adverse. *King v. Pardee*, § 471.

[NOTES.— See §§ 472-502.]

KING v. PARDEE.

(6 Otto, 90-96. 1877.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.— This is an action of ejectment brought in the court below in June, 1871, by James Turnbull, Jr., a subject of Mexico, against Ario Pardee, a citizen of Pennsylvania, to recover one undivided eighth part of a tract of land in Hazel township, Luzerne county, Pennsylvania, containing four hundred and thirty-nine and one-half acres, known as the Mary

Kunkle tract. Turnbull having died *pendente lite*, King and other heirs-at-law were substituted in his stead. Edward Roberts and the executors of Algernon S. Roberts, deceased, were admitted to defend with Pardee as his landlord of the premises in question. Plea, general issue.

On the trial, evidence was given tending to show that Alexander Turnbull died seized of the premises in question on the 10th day of July, 1826, leaving a widow and four children his heirs-at-law, namely: James, Alexander, Jane and Margaret, all of full age. The widow died in 1832. Alexander Turnbull, Jr., one of the heirs, died in Philadelphia, 1835, leaving the plaintiff, his son and sole heir-at-law, then in the thirteenth year of his age. It thus appeared that the plaintiff, as heir-at-law of his father, was entitled to any interest in the lands in question of which his father may have died seized. He left Philadelphia for Mexico in 1850, in the twenty-eighth year of his age.

The defendants gave in evidence a judgment on bond and warrant, rendered in the court of common pleas of Luzerne county on the 22d day of February, 1827, against James Turnbull and Alexander Turnbull, Jr. (two of the heirs of Alexander Turnbull), at the suit of William Drysdale, administrator of Alexander Turnbull, Sen., for the sum of \$4,980; also, a *fi. fa.* and *venditioni exponas* issued on said judgment; a levy under said writs upon the premises in question; a return by the sheriff of a sale thereof for the sum of \$25 on the 4th day of August, 1827; and a deed in pursuance of such sale, to John N. Conyngham, the attorney of the plaintiff in the judgment, bearing date the 14th of April, 1828; also, a deed from Conyngham to Drysdale, the administrator, and plaintiff in the judgment, for a like consideration, dated the 10th of July, 1828. Both of these deeds were recorded on the 13th day of January, 1832. The sheriff's deed purported to convey all the right, title and interest of James Turnbull and Alexander Turnbull, Jr., in and to the premises in question; and the deed from Conyngham conveyed all his title and interest to Drysdale. The interest thus levied on and sold was, of course, one undivided half of the premises in dispute. The claim of the plaintiff is, that this purchase at sheriff's sale by the attorney of the administrator inured, in equity, to the benefit of the heirs or distributees of his grandfather, by way of a resulting trust, which would give him a right to one undivided eighth part of the property.

Jane Turnbull, one of the heirs-at-law of Alexander Turnbull, Sen., was the wife of William Drysdale, the administrator aforesaid. Therefore, at this period, July, 1828, the legal title acquired by William Drysdale in the shares of James and Alexander, together with that of his wife and her sister Margaret, who was unmarried, made up the entire legal title to the premises in dispute.

The defendant then gave in evidence a warranty deed in fee-simple for the whole premises from William Drysdale and his wife and Margaret Turnbull to the defendant Edward Roberts, and Algernon S. Roberts, now deceased, for the consideration of \$46,500, which deed was recorded November 23, 1846, and also extracts from the assessment books of Hazel township, Luzerne county, showing the assessment of the property to the Robertses from 1847 down to the commencement of the suit. Evidence was also given tending to show continued notorious and adverse possession of the property by the defendants from 1846 to the commencement of the suit, by opening and working coal mines thereon, building coal-breakers, railroads, houses and other structures, and cutting wood over the whole tract.

The question raised in this case was, whether the resulting trust which it is contended arose in favor of the heirs or distributees of Alexander Turnbull, Sen., upon the purchase made by Drysdale, his administrator, through his attorney, Conyngham, under the judgment and execution against James and Alexander Turnbull, was still valid and in force at the commencement of this action, or whether it was barred by efflux of time.

The associate justice who tried the cause charged the jury as follows:

"1. That though William Drysdale acquired the legal title to the land in controversy by the deed of John N. Conyngham to him, dated July 16, 1828, and recorded January 13, 1832, yet he held in trust for the estate of which he was administrator, or rather for the heirs of the estate (there being no creditors), and held one undivided eighth part thereof for Alexander Turnbull, Jr., or his assigns; that this was not an express trust; that it was not declared in the deed of Conyngham, or to Drysdale, but that it was a trust which the law implied, growing out of the relation of the parties. Drysdale, then, was the legal owner, while at the same time there was an equitable right in the heirs of the elder Turnbull to require him to convey the property to them, or, if he had sold it at an advance, to require him to account for the proceeds of his sale."

"The right of Alexander Turnbull, Jr., and that of the plaintiff, who claims as his heir, is merely an equitable one. I will not, however, now instruct you that the plaintiff cannot recover in this ejectment solely for that reason, but I can call your attention to the question, whether the equity which arose when the sheriff's sale was made to Conyngham, and subject to which Drysdale took the land, survived until this suit was brought. Such rights do not live forever. If they are not asserted within a reasonable time, they die, and generally what is a reasonable time is determined in analogy to the statute of limitations. If it be an implied equitable right to land, ordinarily it cannot be enforced after twenty-one years."

"It is true, if a party in whom such a right is vested has no knowledge of its existence, or means of its knowledge, the law admits of longer delay in asserting the right." Reference was then made to the evidence which the jury was directed to consider, with the instruction that if they found "the plaintiff's father, Alexander Turnbull, Jr., or the plaintiff, had knowledge in 1828, when the trust arose, or in 1832, when the deed to Drysdale was recorded, or at any time more than twenty-one years before 1871, when this suit was brought, or that they, or either of them, had means of knowledge that Drysdale, the administrator, had taken the title to himself and therefore held it in trust, the claim was too stale, that any equity in the plaintiff's favor that may once have existed cannot now be enforced, and that the plaintiff cannot recover."

2. The jury was further instructed, "that by the act of assembly of April 22, 1856, entitled, 'An act for the greater certainty of title and more secure enjoyment of real estate,' it was enacted that no right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to realty but within five years after such equity or trust accrued, with the right of entry, unless such trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the said period; with a proviso, that as to any one affected with a trust by reason of his fraud, the limitation shall begin to run only from the discovery thereof, or when by reasonable diligence the party defrauded might have discovered the same; and with a further pro-

viso, that any person who would sooner be barred by the act should not be thereby barred for two years after its passage."

This act, the jury were instructed, embraced such a trust as the plaintiff is seeking to enforce in this action; and they were charged, that if they found Drysdale was guilty of no fraud in taking the deed to himself, as he did, or even if he became a trustee by reason of his fraud, if they found that his fraud was discovered by the party defrauded, or might have been discovered by reasonable diligence more than five years before 1871, the action could not be maintained, and the verdict should be for the defendants.

3. The jury was also instructed as follows:

"The defendants also insist that they are protected by the general statute of limitations."

"The evidence tends to show, that when Messrs. Roberts bought the land, in 1846, they put Pardee and Fell immediately in possession as their tenants, and that these tenants have continued in possession ever since. You have heard the evidence; what it proves is for you. It is not contradicted that these tenants sunk coal-shafts and slopes on the land, built railroads, coal-breakers, numerous houses, a saw-mill and cut timber over the whole tract. Was this an adverse, exclusive, notorious, hostile and continued possession for twenty-one years before the suit was brought? If it was, the plaintiff cannot recover; he is barred by the statute of limitation."

"It is true no length of possession will protect a party against the entry or action of one in subordination to whom the possession has been held; and if the entry was in subordination to the title or right of another, the possession is presumed to be continued subordinate until notice of adverse claim is brought home to the holder of the paramount title. But I see no evidence that the defendants entered in subordination to any right of the plaintiff. When we speak of a subordinate title, we mean that the inferior title is in privity with another, as in case of a tenancy for years, life, at will, etc. There was no such entry in this case. The Messrs. Roberts put upon record at the beginning, a deed declaring the entire interest to be in themselves; and there is no evidence that either they or their tenants, Pardee and Fell, ever acknowledged a superior right, or any right, in the plaintiff."

"It is also true that the possession of one tenant in common is generally regarded as the possession of his co-tenant until an ouster has taken place; and an ouster must be proved or presumed from facts in proof. It is argued on behalf of the plaintiff that he was a tenant in common with the Messrs. Roberts in 1846, when they entered by their tenants. Certainly he was not of the legal estate; but if he was then a tenant in common with them, what is the legitimate effect of the evidence? It has been decided by the supreme court of this state, that, when one tenant in common enters on the whole and takes the profits, and claims the whole exclusively for twenty-one years, the jury ought to presume an ouster, though none be proved. 10 S. & R., 182; 9 Pa. St., 226; 13 S. & R., 356; 3 W., 77."

"The jury are, therefore, instructed that if they find from the evidence that the defendants entered upon the property in 1846, by themselves or their tenants, claiming it as their own exclusively, receiving its profits, and that they have maintained notorious, adverse, exclusive, hostile, and uninterrupted possession of the entire tract ever since, the verdict should be for the defendants."

4. The court also charged the jury that the plaintiff, claiming as he does as

heir of his father, stands in no better situation than his father would stand in were he living and had this action been brought by him.

§ 471. *In Pennsylvania a resulting trust, if not sought to be enforced for twenty-one years, is barred, especially against a party whose possession is notorious and adverse.*

To each proposition of this charge in favor of the defendants the plaintiff excepted; and the question here is, whether it contained any error prejudicial to him. After giving due attention to the laws and judicial decisions of Pennsylvania, we are satisfied that the charge was as favorable to the plaintiff as could be asked. Each of its positions seems to be abundantly sustained by authority. A leading case on the first point is *Strimpfler v. Roberts*, 18 Pa. St., 283, which adopts the general rule, that a resulting trust, resting in parol, is to be regarded as extinguished after the lapse of twenty-one years. This case has frequently been affirmed by subsequent cases cited in the defendant's brief. In *Fox v. Lyon*, 33 id., 474, it is said: "In *Strimpfler v. Roberts* it was decided, on great consideration, and reaffirmed in *Brock v. Savage*, 31 id., 401, that where a warrant is issued to one person, and the purchase-money is paid by another, and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase-money is gone, unless he takes possession of the land, or brings ejectment to recover it, within twenty-one years from the date of the warrant; and after that lapse of time he cannot recover, no matter how clearly he may be able to prove that the legal owner was, in the beginning, a trustee for him." And this decision was followed in the said case of *Fox v. Lyon*. It was also followed and reaffirmed in the subsequent cases of *Halsey v. Tate*, 52 id., 311, and in *Lingenfelter v. Richey*, 62 id., 123. In the latter case, it was claimed that a deed absolute on its face was nevertheless in trust. The court, following and relying on the cases of *Strimpfler v. Roberts*, and other cases to the same effect, with reference to the parties claiming the benefit of the said trust, said: "As they claim title to the land against the express language of the deed, they were bound to show, by clear and satisfactory evidence, that there was a resulting trust in favor of Sparks, and that he had taken such possession of the land, or exercised such exclusive acts of ownership over it, within twenty-one years from the time the trust arose, as would prevent its extinguishment."

It is, therefore, an undoubted rule of law in Pennsylvania, that a resulting trust in land, if not sought to be enforced for a period of twenty-one years, and is not reaffirmed or continued, will, under ordinary circumstances, be extinguished. This rule is especially applicable where the party having the legal title has, during the required period of twenty-one years, been in notorious and adverse possession, paying the taxes and exercising all the usual rights of ownership, and his title has, for the whole period, been on record in the proper office. On this point, therefore, we think the charge was correct and unexceptionable.

We are also of the opinion that the statute of 1856 and the general statute of limitations were applicable to the case upon the facts as submitted to the jury. As these points are fully explained in the charge itself, we deem it unnecessary to discuss them. The fourth point needs no remark.

Judgment affirmed.

§ 472. *General principles.*—An express voluntary trust cannot be enforced if disavowed for such length of time as would make adverse possession a bar. Time protects a trustee of a

constructive trust, and such a trust will seldom be enforced after the lapse of twenty years. *Boone v. Chiles*,* 10 Pet., 177.

§ 478. Mere lapse of time does not bar a trust. *Oliver v. Piatt*, 8 How., 833; *United States Bank v. Beverly*, 1 How., 151.

§ 474. The statute does not run against an established and continuing trust; but the rule is different where the possession of the trustee is openly hostile. *Bowman v. Wathen*, 2 McL., 398.

§ 475. The statute of limitations does not operate in cases of trust. *Piatt v. Oliver*, 2 McL., 268; *Walton v. Coulson*, 1 McL., 129.

§ 476. Equity follows the rule of law and after the lapse of forty years will presume that a trust has been satisfied or extinguished. *Prevost v. Gratz*, 6 Wheat., 481.

§ 477. One charged as executor, notwithstanding his renunciation, cannot avail himself of the statute of limitations. Trustee cannot denude himself of trust without notice. *Pulliam v. Pulliam*, 10 Fed. R., 71.

§ 478. Lapse of time may constitute a bar to relief in equity in case of a trust, where the trust is denied, or the character and nature of the trust are obscured by lapse of time and long acquiescence. *Livingston v. Proprietors of the Ore Bed in Salisbury*, 16 Blatch., 549.

§ 479. Under the California statute of limitations a prescriptive title as against the state cannot be acquired in lands held as trustee. *Weber v. Harbor Commissioners*, 18 Wall., 57.

§ 480. The statute of limitations runs against a trustee in favor of a *cestuis que trust*. *Longworth v. Close*, 1 McL., 293.

§ 481. Length of time is no bar to a trust; it continues to follow the property or its proceeds; but after the lapse of many years less exact proof will suffice to support the presumption of innocence of fraud. *Prevost v. Gratz*, 6 Wheat., 481.

§ 482. If a trust, in property or otherwise, is still subsisting in the hands of an executor as executor, the lapse of four years does not bar a remedy against him. Specific personal property held by the testator in trust must be held by the executor likewise. *Trecothick v. Austin*, 4 Mason, 29.

§ 483. The statute of limitations does not apply to express trusts. *Seymour v. Freer*, 8 Wall., 218.

§ 484. Executor an express trustee. Demand against him not barred by statute of limitations. *Pulliam v. Pulliam*, 10 Fed. R., 26.

§ 485. An express trust as between trustee and *cestui que trust* is not barred by lapse of time. *Hancock v. Walsh*, 8 Woods, 351.

§ 486. Length of time, pleaded against the enforcement of a resulting trust, is no defense, unless the trustee had been openly in possession of the land during such time, and constantly denying the trust attempted to be set up. *Hunter v. Town of Marlboro*, 2 Woodb. & M., 168.

§ 487. The lapse of time which will bar a constructive trust depends upon the circumstances of each case. *Michoud v. Girod*, 4 How., 503.

§ 488. In cases where a trust is constructive and also arises out of fraud of the trustee, lapse of time is no bar in equity. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualifications that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust where the demand is stale or the wrong has been long acquiesced in. *Stevens v. Sharp*,* 6 Saw., 113.

§ 489. The doctrine that the statute of limitations is a bar to a trust does not apply to constructive trusts. So held where a creditor's bill was filed to obtain a sale of certain lands of a deceased debtor, the defendants setting up the statute of limitations. *Hayman v. Keally*,* 3 Cr. C. C., 325.

§ 490. The statute of limitations does not apply to cases of constructive trusts. Lapse of time is no absolute bar in equity. *Manning v. Hayden*. 5 Saw., 360.

§ 491. Rules of decision in equity cases for federal courts. There being no statutory bar in Arkansas, a vendor's lien is not barred under twenty years. *Butler v. Douglass*, 1 McC., 630.

§ 492. The rule in equity as to the statute of limitations in cases of trusts is that those trusts which are mere creatures of a court of equity and not within the cognizance of a court of law are not within the operation of the statute. So long as there is a subsisting and continuing trust, acknowledged or acted upon by the parties, the statute does not apply; but other trusts which are the ground of an action at law are within it. Under this rule the statute does not apply in the state of New Jersey to a bill by legatees or distributees. *Wisner v. Barnet*, 4 Wash., 631.

§ 493. Illustrations of the rule.—A delay of twenty years is, in the view of equity, unreasonable, and after that period equity will not enforce a trust. McKnight, in 1813, by deed conveyed to Robert I. Taylor certain property in Alexandria upon trust that if McKnight should not, on April 1, 1818, pay certain creditors named, he was, on notice of the default, to

sell the land and discharge the debts. The bill was filed in 1837 by Taylor, and set forth that he had been required by certain creditors to sell the land; that certain debts were unpaid and that the land had been conveyed to other persons to secure a debt, which was not paid, but the lien was still on record, and that the sale could not be made without the aid of chancery. The main defense was the delay, and it was held that the creditors had not used due diligence in enforcing their rights, and therefore had no right to call into action the powers of a court of equity. *McKnight v. Taylor*, * 1 How., 161.

§ 494. In cases of exclusive jurisdiction, courts of equity are not bound by the statute of limitations, and will not follow it by analogy unless the reason of the law applies as cogently as in suits at law. Trusts form part of such jurisdiction, and as to them equity acts on the maxim *vigilantibus et non dormientibus jura subserviunt*. Where the equities of third persons intervene trusts will not be enforced where misconduct on the part of the trustee has been acquiesced in for a long time. Frederick Marx, being the trustee of Harriet M. Etting, a *feme covert*, invested, in 1864, the trust funds in Confederate bonds. Later, in the same year, Edward Mayo was substituted as trustee, and all the property was turned over to him. In 1869 Frank M. Etting was substituted as trustee on the prayer of the *cestui que trust*, and all the securities were turned over to him, and were all received except the Confederate bonds. Certain correspondence, emanating from Etting, showed that neither he nor his *cestui que trust* pretended to hold Marx liable for the bonds. The complainant became *sui juris* in 1870. Marx died in 1877, leaving debts to a considerable amount, and if his estate was held liable for the bonds these would never be paid. Suit was instituted in 1877 by Harriet M. Etting to recover from Marx's estate the value of the bonds. *Held*, that it could not be maintained. *Etting v. Marx*, 4 Hughes, 312; 4 Fed. R., 678.

§ 495. A bill to establish a trust on account of fraud will be dismissed on the ground of staleness after the lapse of twenty-five years, where the facts giving rise to the fraud have been acquiesced in, and important witnesses are dead and the whole transaction was public, and there has been no concealment. So held in an action brought to set aside a sale of real estate made under an order of the court obtained by an administrator to satisfy a claim due himself. The sale took place in 1830, and the suit was commenced in 1858. The alleged fraud consisted in obtaining the consent of the widow and heirs to the claim. *Badger v. Badger*, 2 Wall., 87 (§§ 403-4).

§ 496. Where a person is not a strict trustee, but holds under a title adverse to the *cestui que trust*, he is entitled to the bar of twenty years both in equity and at law. Thus in an action to obtain a conveyance of land held by defendants under a prior grant and entries older than plaintiff's entry, the defendants relied entirely on their patent, making the case depend on the validity of plaintiff's entry, which was made in July, 1784, and his patent issued in February, 1794. The bill was filed in December, 1815. The validity of entry was upheld, but relief was denied because of the statute of limitations, which was applied. *Elmendorf v. Taylor*, 10 Wheat., 152 (§§ 740-44).

§ 497. In New York, bills for relief in cases of trust not cognizable by courts of law are to be filed within ten years after the cause of action accrues. It seems that no lapse of time will operate as a bar in favor of a trustee in cases of actual intentional fraud practiced by him upon the *cestui que trust*. The daughters of James R. Smith, who died in 1817, were entitled to receive one-third of their shares of his estate absolutely, and the remaining two-thirds subject to a limitation. In 1829 the estate was divided, and the one-third was given to the daughters, and the two-thirds of the shares (being realty) were conveyed to Dyson, and by him conveyed to each of them respectively, they joining in the deeds. In 1843, owing to a doubt as to the title of Mrs. Jeanet Clarke, one of the daughters, her son George executed a release of all his interest, and she died in 1847, and her son in 1855. A suit was commenced in 1869 by the heirs of George, claiming that his mother was entitled to a life estate only, and he to a remainder in fee, of which he had been defrauded by the breach of trust on the part of the trustees. *Held*, that the trustees were protected by the statute. *Clarke v. Boorman*, * 18 Wall., 498.

§ 498. Acquiescence in the misconduct of a trustee, connected with knowledge of the fault, will, if continued a great length of time, bar an action against the trustee. A trust was created by Mr. Berry in 1816, in favor of his daughter-in-law, a widow, and her three daughters, the trust to terminate on the marriage of the widow, or when one of the children reached her majority. After the death of Berry, his widow wasted the property, and in an action commenced in 1832 by the three children, by their uncle, in a court having equity powers to charge Beale, the trustee, with waste, it was decided that he was not guilty. No appeal was taken from the decision, and in 1839 the eldest daughter, one of the complainants, reached her majority. In 1866 Beale died, and in 1860 the youngest daughter died, and the bill was filed in 1867 against the executrix of Beale, seeking to hold his estate liable for waste committed prior to 1830. One of the complainants testified that in 1834 or 1835 she had dissuaded her

husband from commencing a suit against Beale. *Held*, that the claim was stale and could not be maintained. *Hume v. Beale*, 17 Wall., 336 (§§ 819-21).

§ 499. Where a person standing in a fiduciary position purchases trust property, the right of the beneficiary to avoid the sale must be exercised within a reasonable time. What is reasonable time has never been held to be any determinate number of years or days as applied to every case, but must be determined in each case upon all the elements of it which affect that question. So held in an action by a corporation to avoid a sale of corporate property to a director. *Twin-lick Oil Co. v. Marbury*, 1 Otto, 587.

§ 500. The statute of limitations does not apply to a case where the owner of the legal title gives a bond to convey the title on the payment of certain promissory notes given by the vendee; the contract gives rise to an express trust against which the statute does not run. *Lewis v. Hawkins*, 23 Wall., 119.

§ 501. Where parties secure a patent for lands by the presentation of a worthless document, they hold as trustees for the real owners, against whom (in California) the statute of limitations will not run until after a discovery of the fraud. *Hardy v. Harbin*, 4 Saw., 549.

§ 502. A., by his will, after making several bequests, gave the balance of his estate to B., subject to the payment of \$3,000 to C. and D., in trust for the support of E. and F. B. entered into possession of the estate and continued to occupy it for thirty years, when his estate being sold by his assignee in bankruptcy, F. claimed a lien for part of the bequest of \$3,000. *Held*, that B. was merely an implied trustee, and that as to an implied trustee, who has entered into possession of the property in his own right, and who holds for his own benefit, but whose title is subsequently, by matter of evidence or construction of law, turned into that of a trustee for the use and benefit, in whole or in part, of another, time does run, and the statute of limitations does apply; and that for this reason F.'s claim was barred. *In re O'Neale*,* 6 N. B. R., 425.

IV. LIMITATIONS AT LAW (EXCLUSIVE OF ACTIONS AFFECTING THE TITLE TO REAL PROPERTY). 1

SUMMARY—*Claims against the United States*, § 503.

§ 503. Claims against the United States, cognizable by the court of claims, are barred after five years after the claim accrues. In July and August, 1865, Clark and Fulton, merchants in New Orleans, and Palmer, a merchant at Mobile, consigned cotton to one Dexter, a supervising special agent of the treasury department at Mobile, because of the convenience, as the government had charge of the railroads, where it was claimed by Clark, and Dexter, pursuant to orders from the department, shipped it to New York, where it was sold and the proceeds paid into the treasury. The action was commenced in 1872 in the court of claims. *Held*, that the action was barred. *Clark v. United States*, § 504.

[NOTES.—See §§ 505-556.]

CLARK v. UNITED STATES.

(9 Otto, 493-496. 1878.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal from the court of claims. The facts of the case cannot be more clearly or compactly stated than they are presented in the findings of the court. The findings are as follows:

"In July and August, 1865, the petitioners, James S. Clark and Edward Fulton, were merchants and copartners doing business at New Orleans, under the firm name and style of J. S. Clark & Co., and Joseph C. Palmer was a merchant at Mobile.

"In said July and August the petitioners were the owners jointly of nine hundred bales of cotton, which arrived at Mobile in the last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising special agent of the treasury department for the department of Alabama.

"At the times above stated the government had charge of the railroads, and the cotton was consigned to Mr. Dexter to facilitate its arrival at Mobile, and on its arrival there it was claimed of him by the petitioners.

"In August, 1865, Mr. Dexter, having received orders from the treasury department to ship all the cotton received by him, shipped the said nine hundred bales to New York, where it arrived and was sold by the United States, and the net proceeds thereof, amounting to \$127,350, were paid into the treasury.

"The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872."

The United States rely upon two defenses:

1. That the petitioners did not, within two years after the suppression of the rebellion, prefer their claim in the court of claims.

This limitation is prescribed by the "act for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts of the United States," passed March 3, 1863. 12 Stat., 863. It is confined to cases arising under that act.

2. That the petition was not filed in the court of claims within six years after the cause of action accrued.

This limitation is found in the tenth section of the act relating to the court of claims, also of March 3, 1863. 12 Stat., 765. That section enacts:

"That every claim against the United States cognizable by the court of claims shall be forever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues: *Provided*, that claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided further*, that the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accruing during minority, and of idiots, lunatics, insane persons and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the disability had ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

In the Revised Statutes of 1874, section 1009, the first proviso was dropped. It was then needless, the time of the saving thereby created with respect to the claims to which it related having before expired.

The counsel of the appellants have contended, in an argument of unusual research and ability, that the cotton in question was not captured or abandoned property within the meaning of the act upon that subject, and that hence the limitation in that act has no application to this case. Our view renders it unnecessary to consider this point. We therefore pass from it without further remark. The only question to be considered is whether the action is barred by the limitation of six years in the court of claims act before referred to.

§ 504. *A claim for cotton sold by the United States government in 1865, which was not made or prosecuted till 1872, is barred by the statute of limitations.*

Nothing can be clearer than the terms of the limiting section. It begins by declaring that every claim cognizable by the court "shall be forever barred," unless the petition "shall be filed within six years after the claim first ac-

crued." Then follows the proviso naming the disabilities which shall arrest the running of the statute, and either of which shall give three years for the filing of the petition "after the disability has ceased." Finally it is enacted that "no other disability shall prevent any claim from being barred, nor shall any of said disabilities operate cumulatively."

It is not claimed that any of the disabilities named affected *either of the appellants*. In the early part of April, 1862, New Orleans was captured by the naval forces of the United States under the command of Admiral Farragut. On the 1st of May following the national military forces under the command of General Butler took possession of the city. It was never afterwards in possession of the insurgents. *Desmare v. United States*, 93 U. S., 605. The appellants resided there. It is a part of the public history of the country, of which we are bound to take judicial notice, that from the time last mentioned communication between that place and the seat of the national government was constant and uninterrupted.

In the case just referred to this court said: "Upon the issuing of General Butler's proclamation the legal *status* of New Orleans and its inhabitants with respect to the United States became changed. Before that time the former was enemy's territory and the latter were enemies. . . . General Butler's proclamation was proof of the subjugation of the city and the re-establishment of the national authority. The hostile character of the territory thereupon ceased, and the process of rehabilitation began. The inhabitants were at once permitted to resume, under the regulations prescribed, their wonted commerce with other places, as if the state had not belonged to the rebel organization. *The Venice*, 2 Wall., 258. But they were clothed with new duties as well as new rights."

The cotton was shipped to New York in August, 1865, and there sold, and the proceeds paid into the treasury of the United States. The claim then first accrued. The petition was filed on the 27th of March, 1872. This was at least six months in excess of the six years limited by the statute. During all this period the appellants could easily have put the proper machinery of the law in motion. The delay is unaccounted for.

The supplementary briefs filed by the parties since the argument at the bar do not, we think, call for any special remarks. The case is clearly within the bar of the statute, and we are constrained to hold accordingly.

Judgment affirmed.

§ 505. *Time limited.*—The statute of limitations of Maryland bars actions on administrators' bonds after twelve years after the bond is approved, and contains no exception where the obligor is absent from the state. *Partridge v. Todd*,* 1 Biss., 69.

§ 506. An action against a bank or its representative for damages caused by a refusal to permit a transfer of stock to be made is not barred by the lapse of one year by Louisiana law. *Case v. Bank*, 10 Otto, 446.

§ 506a. The interest of a creditor in the property of a debtor, fraudulently conveyed, is a legal and not an equitable asset, and hence the limitation of one year within which proceedings may be taken after the sale does not apply. *Orendorf v. Budlong*, 12 Fed. R., 26.

§ 507. Under the statute of Virginia the action of detinue is barred in five years, and adverse possession of a slave for that time consequently constitutes a good defense in an action of detinue, of which a purchaser of such possessor may avail himself. *Shelby v. Guy*, 11 Wheat., 361.

§ 508. *Construction of statute.* An importer must bring his suit against the collector to recover back duties within ninety days after the rendition of an adverse decision by the secretary of the treasury. *Chung Yune v. Shurtleff*, 7 Saw., 448.

§ 509. *Limitation to demands for excess of duties charged begins to run from the date of the withdrawal entry.* *Iselin v. Barney*, 5 Blatch., 186.

§ 510. A contingent claim, which is not due or which had not accrued before the close of the administration, is not barred by the statutory limitation in Illinois of two years within which to exhibit claims against a decedent's estate. *Payson v. Haddock*, * 8 Biss., 295.

§ 511. A suit in Massachusetts may be brought against an administrator within one year after another suit has been abated for defect of form. Bringing suit in the wrong circuit is such a defect in form. Cases cited. *Caldwell v. Harding*, 1 Low., 326.

§ 512. The statute of limitations in favor of executors and administrators in Massachusetts does not begin to run against one (particularly one beyond seas) contesting the validity of the administration, until the affirmance of the decree by the supreme court of probate. *Trecothick v. Austin*, 4 Mason, 16.

§ 513. In an action to establish a right to relief for public money, stolen from plaintiff when a paymaster in the army, which he had paid to the proper officer when he accounted, and owing to the circumstances the United States had no claim against him for it, it was held that his claim to have the same refunded was barred after the lapse of six years. *United States v. Smith*, * 15 Otto, 620.

§ 514. Statutes of limitations of Arkansas. Unsealed written contracts barred in five years from maturity. *Ross v. Jones*, 22 Wall., 585.

§ 515. The statute of limitations begins to run on a note payable on demand from its date. In California the action is barred in four years if the note is made within the state, and in two years if made without the state. So held in an action on a note payable on demand more than twelve years before the action was commenced. *Bartlett v. Rogers*, * 8 Saw., 62.

§ 516. Under section 5057, Revised Statutes of United States, suits by an assignee in bankruptcy for the collection of the bankrupt's debts and assets must be brought within two years from the time that the cause of action accrued to such assignee, or the same will be barred. *Walker v. Towner*, 16 N. B. R., 285; 4 Dill., 165.

§ 517. Where an assignee filed his petition to recover debts due the estate of his bankrupt within two years from the time such debts accrued to him as assignee, but by direction of his counsel to the clerk the writ of summons was not issued until more than two years from the time the claims accrued, *held*, that his action for the claims was barred. *Ibid*.

§ 518. The effect of the repealing act of March 3, 1863 (12 Stat., 741, sec. 14), is to subject all suits and prosecutions for the recovery of penalties and forfeitures arising under the customs laws, pecuniary or otherwise, to the five years' limitation provided by the act of February 28, 1839; and all prosecutions for crimes arising under said laws it leaves to the like limitation of five years provided by the act of March 26, 1804, the only difference being that in the case of penalties and forfeitures the statute does not run as against persons and property concealed or beyond the reach of process. *In re Landsberg*, * 11 Int. Rev. Rec., 150; *United States v. Mailard*, 13 Int. Rev. Rec., 27; 4 Ben., 459.

§ 519. Under the act of March 3, 1825, the sureties of a postmaster are discharged unless the postmaster-general institute suit within two years after the default of their principal. *Roddy v. United States*, * 3 Pittsb., 374; 10 Pittsb. L. J., 161.

§ 520. Under the consular act of 1803, chapter 62, section 4, the penalty of \$500 for not depositing the ship's register with the consul on arrival in a foreign port must be sued for within two years, the limitation prescribed by the act of 1790, chapter 36, section 81, it not being a revenue law within the meaning of the act of 1804, chapter 40, section 3. *Parsons v. Hunter*, 2 Sumn., 419.

§ 521. Section 15 of the Utah statute of limitations provides that "an action founded upon a contract, obligation, or liability founded upon an instrument of writing," may be brought within four years. Section 17 provides that "an action upon a contract, obligation or liability not founded upon an instrument of writing," may be brought within two years, and section 20 that "an action for relief not herein before provided for must be commenced within four years after the cause of action shall have accrued." In an action by husband and wife, for injuries sustained by the wife by reason of the negligence of the carrier, *held*, that the liability incurred was not embraced either in the fifteenth or the seventeenth section, but was governed by the limitation provided in the twentieth section. *Thomas v. Union Pacific Railroad Co.*, * 1 Utah T'y, 235.

§ 522. Where an administrator and his sureties die, a suit brought by a legatee or distributee to recover for the default of the original executor must be brought against the administrator of the executor, or the executor of his sureties, within three years after the last administration is taken out; otherwise the suit will be barred under the statute of limitations of Rhode Island. *Pratt v. Northam*, 5 Mason, 95.

§ 523. In an action of trespass for mesne profits, brought in the District of Columbia, the plaintiff is barred from recovering damages for a period more than three years prior to the commencement of the action. *Meloy v. Johnston*, * 2 MacArth., 202.

§ 524. Penalties under the embargo act of January 9, 1808, chapter 8, are to be sued for

within the time limited by the statute of limitations of April 30, 1790, chapter 9, and not by the act of March 2, 1799, chapter 128, section 89, or the act of March 26, 1804, chapter 40. *United States v. Mayo*, 1 Gall., 397.

§ 525. In a suit of the United States against the administratrix of a surety in a revenue bond, brought thirteen years after the breach, and twelve years after she had settled her administration account, without having had previous notice of the bond or forfeiture, she was held to be entitled to judgment, on pleading want of assets and fully administered. *United States v. Primrose, Gilp.*, 56.

§ 526. An assignee in bankruptcy may sue in a federal court on a note of which the bankrupt is payee; and if the note was witnessed such action is not barred by the law of Massachusetts until the expiration of twenty years from the time the note became payable. *Pritchard v. Chandler*, 2 Curt., 488.

§ 527. A bill of review will be barred by the lapse of a reasonable time after discovery of the new matter; but what shall be considered a reasonable time depends upon the sound discretion of the chancellor under all the circumstances of the case. *United States v. Samperyac, Hemp.*, 118.

§ 528. By the statute of limitations, enacted by congress March 3, 1863, all actions on claims against the United States, accruing more than six years before the passage of the act, are to be limited to three years from the date of such passage; suits on all other claims are to be barred in six years from the time when they accrued. *Carter v. United States*,* 6 Ct. Cl., 81.

§ 528a. Where a party receives railroad bonds in payment of a debt, and they prove to have been stolen from the apparent obligor, and were therefore invalid, as to length of time required in Louisiana to bar an action to recover the original debt, see *Gaylord v. Copes*,* 10 Fed. R., 827.

§ 529. Coupons.—Actions upon coupons are governed by the same rule contained in the statute of limitations as applies to the bond to which they are attached. Thus where the plaintiff brought suit on certain coupons detached from their bonds, and the defendant pleaded the statute of limitations, it was held that coupons partake of the nature of the bonds to which they belong, and as the bonds were specialties, and not barred by a shorter period than twenty years, the same limitation applied to the coupons. *Kershaw v. Town of Hancock*,* 18 Blatch., 888.

§ 530. A suit upon a coupon is not barred by statute of limitations unless the lapse of time will also bar suit on the bond. *City of Lexington v. Butler*, 14 Wall., 232.

§ 531. An ordinary interest coupon is a part of the bond, and attached for convenience in collecting the interest thereon, and hence is of the same nature as the bond, and a suit upon it is barred by the statute of limitations only in cases where a suit upon the bond would be barred. *The City v. Lamson*, 9 Wall., 477.

§ 532. Miscellaneous.—Under the law of Georgia, when bank bills have ceased to circulate as money, the statute of limitations applies the same as to other contracts. *Sampler v. The Bank*, 1 Woods, 527.

§ 533. The statute of limitations of the state in which the bankrupt resides runs against his creditors after bankruptcy, and no debt can be proved or enforced against his estate on which an action could not be maintained in the state courts. *Nicholas v. Murray*, 5 Saw., 320.

§ 534. Where a suit is brought in the court of claims upon a claim that is in substance a defense against a demand that might be made by the United States, the statute of limitations of the court of claims does not apply. *United States v. Clark*, 6 Otto, 37.

§ 535. The statute of limitations will run in favor of a debtor after his discharge under the insolvent debtor's law. *Bowie v. Henderson*, 6 Wheat., 514.

§ 536. It does not follow that because the period of limitation has elapsed since a debt was contracted, that therefore it is barred by the statute. *In re Wright*, 6 Biss., 317.

§ 537. A claim for money loaned a decedent is properly rejected where the evidence that the loan was made is not satisfactory and thirty-three years elapsed since without evidence that it was presented to the testator in his life-time, or against his estate after his death. *Rogers v. Law*, 1 Black, 253.

§ 538. Where new assets come into the hands of an administrator of an insolvent estate, after the original distribution of assets, and such new assets are more than sufficient to pay the debts of the estate, a suit will lie against the administrator for payment on behalf of the creditors notwithstanding the statute of limitations has run against the debts. *Dexter v. Arnold*, 3 Mason, 284.

§ 539. An executor may pay a debt barred by the statute. *Fairfax v. Fairfax*, 2 Cr. C. C., 25.

§ 540. Judgments are not within the statute of limitations of Ohio. *Todd v. Crumb*, 5 McL., 172.

§ 541. In Ohio, the judgments of the courts of other states are regarded as specialties and subject as such to statutes of limitation. *Randolph v. King*, 2 Bond, 105.

§ 542. Plea of statute of limitations is not good in an action upon a judgment of another state. *Moore v. Paxton, Hemp.*, 51.

§ 543. A judgment creditor, who has been occupied in pursuing the personalty of a deceased debtor, and whose delay is caused by an injunction from exhausting the personalty, is not barred from a *scire facias* against the heir by lapse of time. *Alston v. Munford*, 1 Marsh., 272.

§ 544. The prescriptions under the Louisiana statutes do not apply to rights which result from the determination of another action, and hence do not prescribe the mesne profits which accrued more than three years prior to the bringing of an action against possessors of lands in bad faith. *New Orleans v. Gaines*, 15 Wall., 624.

§ 545. Statutes of limitation are applicable to mining claims. 420 Min. Co. v. Bullion Min. Co., 3 Saw., 634.

§ 546. Article 3505 of the Louisiana code does not bar suits upon non-negotiable paper or judgments upon negotiable paper. So held in an action against the executors of Tucker, on certain judgments obtained against Tucker in his life-time upon certain promissory notes, and also upon certain due bills. The section bars actions on bills of exchange, notes payable to order or bearer, except bank notes, those of all effects negotiable or transferable by indorsement or delivery, after five years after their maturity. *Hill v. Tucker*, 13 How., 458 (§§ 1017-21); *Goodall v. Tucker*,* *id.*, 469.

§ 547. In cases of nuisance the law of prescription has no application. *Fertilizing Co. v. Hyde Park*, 1 Otto, 659.

§ 547a. The limitation prescribed for commencing actions arising under the patent laws created by section 53 of the act of July 8, 1870, was not repealed when that section was incorporated into the Revised Statutes as section 4921 as to causes of action then accrued; such actions may be brought within the time prescribed by the law of 1870. Thus where an action was brought for the violation of a patent for a brake, which was committed between July 6, 1871, and July 6, 1873, and the patent had been granted in 1852, and extended for seven years on July 6, 1866, and the act of 1870, requiring such actions to be commenced within six years after the granting, extension or expiration of letters patent, had been repealed in 1874, except as to the causes of action then accrued, *held*, that a demurrer to complaint was bad. *Sayles v. Oregon Central R'y Co.*,* 6 Saw., 32.

§ 548. The plea of prescription does not apply to a case of pledge under the Louisiana code of 1808. *Livingston v. Story*, 11 Pet., 353.

§ 549. Where a statute declares that under certain circumstances a stockholder in a bank shall pay a debt due from it, and such a liability is incurred, the liability is not upon any "lending or contract," within the meaning of the New Hampshire statute of limitations, which bars all actions of debt grounded upon any lending or contract, unless commenced within six years next after the cause of action accrued. So held in an action of debt upon a dishonored bank note issued by a bank in which defendant was a stockholder. The charter of the bank provided that if the bank divided its stock previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills when presented for payment, the original stockholders, their successors and assigns, should be jointly and severally personally liable to the holder. *Bullard v. Bell*,* 1 Mason, 243.

§ 550. The Cherau Bank having failed in 1860, the statute of limitations began to run from that time. *Godfrey v. Terry*, 7 Otto, 171.

§ 551. In Virginia the statute of limitations only runs in favor of sureties of officers from the time that the default of the officers is ascertained. *Howards v. Selden*, 4 Hughes, 300.

§ 552. The law of limitations as to the time within which suit must be brought does not apply in cases of unpaid balances, which are liquidated by the receipts at the end of each succeeding quarter. *Postmaster-General v. Norvell, Gilp.*, 106.

§ 553. If suit be brought within the prescribed period after the rejection of plaintiff's claim for taxes "improperly paid," the suit will not be barred although not brought within the prescribed period after the rejection of his claim for taxes "improperly assessed." *Hicks v. James*, 4 Hughes, 471.

§ 554. Where a federal military officer, in charge at New Orleans, intercepted a draft drawn within the enemy's lines on a bank in New Orleans, compelled the bearer to indorse it, drew the money, and accounted for it to the United States, *held*, that if it be claimed that such act was a wrong committed by the officer under color of his authority, then the action to recover the money was barred in two years, the defendant having been for that time within reach of the process of the court. *Britton v. Butler*,* 11 Blatch., 350.

§ 555. The North Carolina act of 1715, adopted by Tennessee, does not apply to actions on promissory notes. *Kirkman v. Hamilton*, 6 Pet., 20.

§ 556. Article 8499 of the civil code of Louisiana, providing a prescription of one year for actions for the payment of the freight of ships and other vessels, does not apply in favor of parties not ship-owners, but ship-brokers, and where the contract is not one of affreightment. *Railroad Co. v. Lindsay*, 4 Wall., 650.

V. LIMITATION IN CRIMINAL CASES.

§ 557. Time limited.—An indictment, consisting of four counts, was found, in 1877, against Hirsh and others. The first two counts charged conspiracy, entered into in 1873, to defraud the United States of duties on certain merchandise. The other counts charged the defendants with knowingly effecting an entry of goods at the custom-house by a fraudulent invoice of them and by a false classification as to their quality and value. The defense rested on the statute of limitations of three years. It was held (1) that an offense punishable under the section of the Revised Statutes relating to conspiracies alone is not a crime arising under the revenue laws, though an overt act necessary to be alleged may be one affecting the revenue of the United States, and so a prosecution thereunder is barred within three years; (2) that a prosecution for effecting an entry of goods by a fraudulent invoice, and by a false classification as to their quality and value, is within section 1046, Revised Statutes (the limitation for crimes arising under the revenue laws), and is not barred within less than five years. *United States v. Hirsh*,* 10 Otto, 33.

§ 558. An indictment for embezzling moneys from the money order office in the postoffice department must be found within two years. The money order office was not created for purposes of revenue, and the crime is not one arising under the revenue laws. So held where an indictment was found in 1874 against the defendant for embezzling moneys from the money order office in New York, where he was a clerk, to which he pleaded the statute of limitations of two years. The government maintained that the crime arose under the revenue laws, and was not barred in less than five years. *United States v. Norton*,* 1 Otto, 566.

§ 559. The act of congress limiting the time for the prosecution of felonies to two years applies to assault and battery. *United States v. Slacum*,* 1 Cr. C. C., 485.

§ 560. Under section 1046 of the Revised Statutes, a prosecution for conspiracy to defraud, etc., is not barred under five years. *United States v. Fehrenback*,* 2 Woods, 175.

§ 561. The prosecution of actions for forfeitures under import revenue laws is controlled by the limitation of the act of 1839, section 4, notwithstanding the act of 1863, section 14. *United States v. Maillard*, 4 Ben., 463.

§ 562. The act of 1790, limiting prosecutions of misdemeanor to two years, applies to common law misdemeanors in the District of Columbia. *United States v. Porter*, 2 Cr. C. C., 60.

§ 563. The thirty-second section of the crimes act of April 30, 1790, limiting suits for penalties to two years after the fine or forfeiture incurred, is repealed by the fourth section of the act of February 28, 1839. *Stimpson v. Pond*, 2 Curt., 502.

§ 564. The fourth section of the act of February 28, 1839, providing that no suit or prosecution shall be maintained for any penalty or forfeiture, pecuniary or otherwise, unless begun within five years, etc., does not include a prosecution for a crime for which the defendant may be punished capitally or by imprisonment. *United States v. Brown*,* 2 Low., 267.

§ 565. If a statute punishes that, as a misdemeanor, which at common law was a felony, the limitation of a prosecution, under that statute, is that of misdemeanor and not that of felony. *United States v. White*, 5 Cr. C. C., 73.

§ 566. A statute limiting the time within which prosecutions for misdemeanors must be instituted is applicable to misdemeanors created by statute subsequent to the act of limitation. *Ibid.*

§ 567. Under the act of April 30, 1790, the defendant is not entitled to the benefit of the two years' limitation, if within the two years he left any place, or concealed himself to avoid detection or punishment for any offense; and to constitute such concealment it is not necessary that the United States should have known that he was the offender. *Ibid.*

§ 568. Upon demurrer to an indictment for an offense against the tariff act of August 30, 1842, that the same had not been found within two years subsequent to the commission of the act charged, held, that the indictment having been found within five years subsequent to the act charged was within the terms of the act of March 26, 1804, and was good. *United States v. Shorey*,* 9 Int. Rev. Rec., 202.

§ 569. By the limitations of crimes act of congress of April 30, 1790, all prosecutions for offenses not capital, or for fines or forfeitures under any penal statute, are barred, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense or incurring the fine or forfeiture. *United States v. Wright*,* 11 Int. Rev. Rec., 35.

§ 570. To an indictment under the thirtieth section of the act of March 2, 1867, alleging that the defendants conspired to defraud the United States of the taxes upon certain distilled spirits, a demurrer was filed on the ground that the prosecution was barred by the two years' statute of limitations of the act of congress of 1790. The demurrer was overruled on the ground that the thirtieth section of the above act, punishing conspiracies, is a revenue law, the period of limitation for prosecutions for offenses against which is five years instead of two. *United States v. Dustin*,* 15 Int. Rev. Rec., 30.

§ 571. An indictment for carrying on the business of distillers of spirits, without having paid the special tax imposed by law, in violation of the act of July 13, 1866, is an indictment founded on a revenue law within the meaning of the act of 1804, and the limitation for the prosecution, trial and punishment of persons guilty of offenses under such law is extended to five years. *United States v. Wright*,* 3 Pittsb., 192; 3 Am. L. T., 17; 11 Int. Rev. Rec., 35.

§ 572. The statute of limitations, passed by congress April 30, 1790, applies to common law offenses within the District of Columbia. *United States v. Watkins*, 3 Cr. C. C., 441.

§ 573. "Fleeing from justice."—The words "fleeing from justice," in the statute of limitations, means "to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States. Fleeing from the criminal justice of the state is not, nor is a departure from the limits of the district irrespective of the motives and purposes of such departure." So the jury was charged where an indictment was found against the defendant for forging the name of a payee on a check drawn by a United States paymaster. The defendant left Kansas, where a criminal proceeding was pending against him, his whereabouts being generally known in Leavenworth, where the act was committed, and he had been afterwards publicly employed in the army paymaster department in New Orleans. *United States v. O'Brian*,* 8 Dill., 381.

§ 574. The continuation of a voyage commenced before the crime was committed is not a fleeing from justice. So held where an officer of an American vessel was indicted in 1873 for beating and wounding a seaman on the high seas. When the offense was committed the vessel was engaged in a whaling voyage and did not return to the United States until more than two years afterwards, by which time the indictment was barred. *United States v. Brown*,* 2 Low., 267.

§ 575. If a person, within two years after the commission of an offense charged in an indictment, leaves the district with intent to avoid detection or punishment for that offense, he is a person "fleeing from justice," although he might, at various periods within the two years, have been arrested within the United States. So held where one White was indicted for burning a government building. The indictment contained no allegation that the defendant had fled from justice, and showed on its face that more than two years had elapsed since the commission of the offense. The plea was not guilty. *United States v. White*,* 5 Cr. C. C., 116.

§ 576. Under the act of 1790, a fleeing from justice need not be a fleeing from a prosecution begun. *United States v. Smith*,* 4 Day (Conn.), 125.

§ 577. "Absence," within the meaning of the one hundred and third article of war, is such an absence as interposes an impediment to the bringing of the offender to trial and punishment, *i. e.*, absence from the United States, and "other manifest impediments" are such only as operate to prevent the military court from exercising its jurisdiction over the offender. Thus, where Thomas Davison was arrested as a deserter in 1880, and preliminary steps were taken to bring him before a court-martial for desertion, and he had enlisted in 1870 for five years and deserted in 1872, and all the time between his desertion and arrest he resided continuously within the city of New York, where the offense was committed, and the one hundred and third article of war (R. S., § 1342) limits the time for trying a person by a court-martial to two years after the offense was committed, "unless by reason of having absented himself, or some other manifest impediment, he shall not have been amenable to justice within that period," on a writ of *habeas corpus* sued out by Davison he was discharged. *In re Davison*,* 4 Fed. R., 507.

§ 578. The thirty-second section of the act of congress of April 30, 1790, exempting wrongdoers from punishment, unless prosecution be instituted within two years from the time of committing the offense, contains this proviso: "Provided that nothing herein contained shall extend to any person or persons fleeing from justice." *Held*, that a "fleeing from justice," within the meaning of the statute, need not be a fleeing from a prosecution begun. *United States v. Smith*,* 4 Day (Conn.), 121.

§ 579. Whether, under the act of congress of April 30, 1790 (1 Stat. at Large, 112), the departure of the offender from the vicinity of the place wherein the offense was committed to his usual residence in another part of the United States, for the purpose of avoiding punishment for that or any other offense, is a "fleeing from justice" so as to make the statute of limitations no bar, unless he returned within two years to the place wherein the offense was committed, making his return so open and public, and under such circumstances that appor-

tunity was offered by the use of ordinary diligence and due means to have arrested him, and unless two years and more have elapsed since that period to the time of finding the indictment, *quære?* *United States v. White*, 5 Cr. C. C., 38.

§ 580. *Practice*.—An indictment for perjury was filed within two years from the time the perjury was alleged to have been committed, on which a *nolle prosequi* was entered. *Held*, that a second indictment, filed within two years of the filing of the first, but more than two years after the date of the alleged perjury, was barred by the act of congress of April 30, 1790. *United States v. Ballard*, 3 McL., 469.

§ 581. Limitation may be given in evidence by the defendant under the general issue in a criminal cause; and the United States may give in evidence the fact that the defendant fled from justice, and therefore was not entitled to the benefit of the limitation. *United States v. White*, 5 Cr. C. C., 73.

§ 582. It is not sufficient ground for arrest of judgment that it appears upon the face of the indictment and the record that the indictment was not found within the time of limitation. *Ibid*.

§ 583. The court will not quash an indictment because it appears upon the record that the indictment was not found within two years after the offense was committed, for that would deprive the United States of the right to reply that the defendant was a person fleeing from justice, or to show it in evidence on the trial. The defendant may avail himself of the limitation either by special plea or by evidence upon the general issue. *United States v. White*, 5 Cr. C. C., 38.

§ 584. If it appears upon the whole record, upon an indictment for a misdemeanor, that the offense was committed more than two years before the indictment was found, the defendant may avail himself of that defense by a general demurrer. *United States v. White*, 5 Cr. C. C., 368.

§ 585. A former conviction and the statute of limitations are matters of defense and not cognizable under an application for discharge upon *habeas corpus*. *In re Bogart*, 2 Saw., 409.

VI. LIMITATIONS IN ADMIRALTY.

SUMMARY — *Libel to reclaim a boat; delay*, § 586.

§ 586. The court of admiralty will dismiss a libel filed to reclaim a boat where there has been long and unexcused delay. Thus, where the libelant sold a boat in 1874 for a certain sum down, and the balance was to be paid within thirty days, and the libel was filed in 1881 to recover the boat on account of a breach of the agreement, and the then owners had bought the boat in 1875, paying full value for it, and had ever since been in peaceable possession of the same, with the knowledge of the libelant, it was held that the court would not enforce the contract on account of laches. *The Walter M. Fleming*, § 587.

[NOTES.— See §§ 588-606.]

THE WALTER M. FLEMING.

(District Court for New York: 9 Federal Reporter, 474-476. 1881.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The libel in this case, by reason of its curious and uncertain averments, presents questions that I pass over to determine the question raised by the evidence; namely, whether, upon the facts proved, a case is made calling for the interposition of this court to take the possession of the canal-boat, *Walter M. Fleming*, from *Cornelius Vanolinda*, who now has the same, and give it to the libelant. The facts are largely in dispute, according to the libelant's testimony. He being the owner and in possession of this boat in July, 1874, at Rochester, New York, made an agreement with one *Charles Vanolinda* to sell the boat for a certain sum, \$150 down, and the balance within thirty days. The \$150 was then paid by the buyer, and the boat was delivered to him, since which the libelant has seen nothing of the boat or the buyer until the commencement of this suit, and has received no part of the purchase money except the \$150. What the full consideration was

agreed to be libelant does not recollect, but he thinks it was over \$500, and he thinks that no bill of sale of the boat was ever given by him.

§ 587. *Laches destroys the equity of a vendor.*

Nothing of all this appears in the libel, which contains no allusion to either Charles or Cornelius M. Vanolinda; and makes one Wright the party defendant, with whom it is evident the libelant has no controversy. But assuming the libelant's recollection to be accurate, which evidently it is not in all respects, and assuming that the state of facts sought to be made by the libelant's testimony is admissible under his libel, his action cannot be maintained; for, according to the libelant's testimony, at the expiration of thirty days from his delivery of the boat to Charles Vanolinda, in July, 1874, he had the right to resume possession of the boat, and from that time to this he has made no attempt to exercise this right. The fact conceded in this case, that no bill of sale of the boat was given at the time of the delivery of the boat to Charles Vanolinda, is deprived of much of its ordinary significance as bearing upon the question whether the title was intended to be transferred by the circumstance that the libelant has no bill of sale. The only bill of sale proved is from William D. Callister to the libelant and one Mr. William H. Crennel. The libelant, doubtless, became possessed of Crennel's interest in the boat, but he has no bill of sale from Crennel. Assuming, however, that the omission to deliver a bill of sale to Charles Vanolinda, under these circumstances, be sufficient to compel the conclusion that there was no intention to part with the title to this boat at the time of the bargain with Charles Vanolinda, still it must in equity be held that any right to reclaim possession of the boat, upon failure of the buyer to perform his agreement, has been waived by this long and unexcused delay of some seven years. And this, certainly, when, as the claimant has proved, the boat was during this long period running upon the Erie canal, and both Charles Vanolinda and the present possessor, Cornelius Vanolinda, had been seen by the libelant on more than one occasion without any demand of the possession ever being made, and when no obstacle existed to prevent the libelant from resuming the possession at any time. It was the libelant's duty, if he intended to reclaim possession of the boat, to do so within a reasonable time after the default; and he cannot be permitted to wait seven years, and then without demand apply to have the court put him in possession as against one who, according to testimony that has not been disputed, bought the boat in 1875, paying full value therefor, and since then has been in peaceful possession of the boat, with the knowledge of the libelant and without objection on his part. The libel is dismissed, with costs.

§ 588. **General principles.**—The statute of limitations of a state is no bar to a suit on the admiralty side of the courts of the United States. *Willard v. Dorr*, 8 Mason, 91.

§ 589. That a demand is stale must in admiralty be specially pleaded. *The Platina*, 3 Ware, 180.

§ 590. While the statute of limitations is not obligatory in admiralty, it will be regarded in adjusting the equities of the parties. *Saunders v. Buckup, Bl. & How.*, 269.

§ 591. It is generally true that courts of admiralty govern themselves in the maintenance of suits by the analogy of common law limitations. *Jay v. Allen*, 1 Spr., 130.

§ 592. Courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogies of the common law limitations; and are not inclined, unless under very strong circumstances, to depart from those limitations. But, independently of any statutable limitations, courts of admiralty will not entertain suits for stale demands. *The Brig Sarah Ann*, 2 Sumn., 206.

§ 593. In a court of admiralty stale claims meet with no more recognition than in a court of equity. *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 15 Blatch., 249.

§ 594. Where a seaman delayed bringing an action against the master for an assault for nearly four years, his action was regarded with but little favor. *Saunders v. Buckup*, Bl. & How., 264.

§ 595. Action against a vessel for personal injuries, barred, as against a mortgagee, by a delay of nearly two years. *Griswold v. Steamer Nevada*, 2 Saw., 144.

§ 596. As to laches in enforcing liens, the same rule applies to liens for wages as to liens for repairs and supplies. *The Dubuque*, 2 Abb., 20.

§ 597. In admiralty a delay of six years, though no technical bar by statute, may still be decisive against a claim for wages by a crew, where, in the meantime, the master has died or changes have occurred affecting the property, its value, etc. *Joy v. Allen*, 2 Woodb. & M., 304.

§ 598. Courts of admiralty will not entertain stale demands for wages. The lapse of twelve years affects a demand for master's wages with the imputation of staleness. *Willard v. Dorr*, 3 Mason, 161.

§ 599. Miscellaneous.—The statute of limitations of Massachusetts, which is substantially a copy of 21 Jac., ch. 16, applies only to suits at common law for mariners' wages, and not to suits in the admiralty. *Brown v. Jones*, 2 Gall., 477.

§ 600. The statute of Anne, limiting suits in the admiralty for seamen's wages to six years, is not a bar to such suits in the courts of the United States. *Willard v. Dorr*, 3 Mason, 91.

§ 601. An American ship, in 1809, sailed from Marblehead on a voyage to St. Petersburg and back, and performed her outward voyage, but on her return voyage was captured and carried into Denmark, and condemned by the Danish tribunals, and afterwards compensation was made, under the treaty with Denmark of the 28th of March, 1830, for the ship and cargo. Upon suit for seamen's wages brought subsequent to the treaty, *held*, that the wages for the outward voyage to St. Petersburg were, by the capture and condemnation, vested by an absolute title in the libellant in 1809; that, as they might then have been sued for, they were stale from lapse of time, upon the principles of courts of admiralty, and incapable of being asserted. *Pitman v. Hooper*, 3 Sumn., 286.

§ 602. A steam-tug collided with (and sunk) another vessel on the 28th of December, 1859. On March 31, 1866, a libel was filed against the tug-owners to recover damages. The proofs showed that the tug remained within the district for more than a year after the collision occurred, and that the tug-owners had been residing, or carrying on business, in the district during the six years intervening between the collision and the bringing of the suit. *Held*, nothing being offered by way of excuse for the delay, that the claim was stale, and for that reason barred. *Smith v. Sturgis*, 3 Ben., 330.

§ 603. Upon libel for wages filed against a vessel by a seaman, the claimants having purchased the vessel after the claim for wages had accrued, *held*, that in order to maintain the defense of stale claim it was necessary to allege and prove that the claimants were purchasers in good faith for a valuable consideration and without notice of the existence of the claim. *The Melissa*, 1 Brown, 476; 6 Ch. Leg. N., 271.

§ 604. Where, under the above circumstances, the proofs showed that the claimants retained a portion of the purchase money in their hands, that at the time of the purchase the vendor agreed to pay all claims then existing against the vessel, and that the claimants were really defending the suit for and in the interest of such vendor, *held*, that the defense of stale claim was wholly untenable. *Ibid*.

§ 605. Libels filed against boats for negligence will not be enforced when the claim is stale, to the injury of third persons; so *held* where a libel was filed against a tug boat to recover the value of a canal-boat alleged to have been sunk through the captain's negligence in September, 1878. The action was commenced in July, 1876, and the tug boat had come into the hands of innocent purchasers without notice, and it was impossible to show in evidence the actual condition of the canal-boat at the time on account of the lapse of time. *The Tug Jessie Russell*, 9 Ben., 181.

§ 606. Courts of admiralty are not governed, in suits to enforce maritime liens, by any statutes of limitation, but they adopt the principle that laches or delay in the judicial enforcement of them will, under proper circumstances, constitute a valid defense. No arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case. Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued. Thus a lien, a suit to enforce which was commenced three and a half years after the cause of action accrued, was allowed against purchasers with notice. *The Key City*, 14 Wall., 653.

VII. LIMITATIONS IN REAL ACTIONS.

1. *Simple Adverse Possession in Actions at Law.*

SUMMARY—*Possession of intruder*, § 607.—*Twenty years' adverse possession*, § 608.—*Effect of saving clause in patent*, § 609.—*Trustee and cestui que trust barred*, § 610.

§ 607. The possession of a mere intruder is not an ouster of the rightful owner. The statute of limitations of Vermont of 1785 does not bar the true owner until the lapse of fifteen years. By the act of 1802 the statute does not run against the true owner of lands held for public, pious or charitable uses. This was repealed in 1819. Thus where an action of ejectment was commenced in 1824 by a foreign corporation to recover lands given it by a royal charter in 1761, in the town of Pawlet, in Vermont, which had been in the possession of Edward Clarke from 1780 until he surrendered it to the town, which in 1794 leased the same to Ozias Clarke, it was held that Edward Clarke was a mere intruder, and that there was no adverse possession until 1794, and as the statute did not run between 1802 and 1819, the statute had run only fourteen years, and was not a bar. *Society for the Propagation of the Gospel v. Town of Pawlet*, §§ 611-18.

§ 608. Uninterrupted, open, visible and notorious adverse possession for twenty years is a good defense to the action of ejectment. So held in an action of ejectment to recover certain lots in the District of Columbia. *Hogan v. Kurtz*, §§ 619-22.

§ 609. A reservation contained in a patent, saving the right of persons claiming under a particular act of congress, does not prevent the statute of limitations from running in favor of the patentee and against those claiming under the act of congress. So held in an action to recover certain property in Peoria, Ill., which was in the possession of Meehan, claiming under a patent, issued to Charles Ballance, for more than ten years. The patent had been issued to Ballance in 1838, subject to the rights of any and all persons claiming under the act of congress of March 30, 1823. *Meehan v. Forsyth*, § 623.

§ 610. When the right of action in a trustee is barred, it is barred in the *cestui que trust* also. So held in an action to recover a lot in San Francisco, California, of which George Harlan died seized in 1850. In 1856 his administrator, Benjamin Aspinall, by an order of the probate court, sold the lot, and the defendants, or those under whom they claim, entered into possession and have remained there since then. In 1864 Aspinall settled up his accounts and was discharged. The probate act limits actions to recover real estate sold by an administrator to three years. The real estate of a decedent is assets in the hands of an administrator, and he is entitled to possession. *Meeks v. Olpherts*, § 624.

[NOTES.—See §§ 627-723.]

SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. TOWN OF PAWLET.

(4 Peters, 480-510. 1880.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This cause is certified to this court from the circuit court for the district of Vermont, upon certain points upon which the judges of that court were opposed in opinion. The original action was an ejectment, in the nature of a real action, according to the local practice, in which no fictitious persons intervene; and it was brought in May, 1829, to recover a certain lot of land, being the first division lot laid out to the right of a society in the town of Pawlet. The plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England, within the dominions of the king of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king." The defendants pleaded the general issue, not guilty, which was joined, and the cause was submitted to a jury for trial. By agreement of the parties at the trial, the jury were discharged from giving any verdict upon the disagreement of the judges upon the points growing out of the

facts stated in the record. Those points have been argued before us, and it remains for me to pronounce the decision of the court.

§ 611. *Pleading the general issue admits the competency of a plaintiff to sue as a corporation; objections to its competency should be made by special plea in abatement or bar.*

The first point is whether the plaintiffs have shown that they have any right to hold lands. In considering this point it is material to observe that no plea in abatement has been filed denying the capacity of the plaintiffs to sue; and no special plea in abatement or bar, that there is no such corporation as stated in the writ. Comyn's Dig., Abatement, E., 16; Mayor, etc., of Stafford v. Bolton, 1 Bos. & Pull., 40; 1 Saunders, 340, Williams' Notes; 6 Taunt., 467; 7 id., 546. The general issue is pleaded, which admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. Conard v. Atlantic Ins. Co., 1 Pet., 386, 450. See the case of Sutton Hospital, 10 Co., 30, b.; Comyn's Dig., Franchise, F., 6, 10, 11, 15; Capacity, A., 2. See, also, Proprietors of Kennebec Purchase v. Call, 1 Mass., 482, 484; Mayor, etc., of Stafford v. Bolton, 1 Bos. & Pull., 40; 1 Saunders, 340, note by Williams.

§ 612. *The recognition in a charter to a town of the capacity of a corporation to hold lands therein, by a designated name, vests the power, even if it did not exist previous thereto.*

But the point here raised is not so much whether the plaintiffs are entitled to sue generally as a corporation, as whether they have shown a right to hold lands. The general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring. But, in the present case, we think there is abundant evidence in the record to establish the right of the corporation to hold the lands in controversy. In the first place, it is given to them by the royal charter of 1761, which created the town of Pawlet. Among the grantees therein named is "The Society for the Propagation of the Gospel in Foreign Parts," to whom one share in the township is given. This is a plain recognition by the crown of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed; and the other proceedings stated on the record establish the fact that the society had received various other donations from the crown of the same nature, and had accepted them. Besides, the act of 1794, under which the town of Pawlet claims the lands, distinctly admits the existence of the corporation, and its capacity to take the very land in controversy.

"Whereas," says the act, "The Society for the Propagation of the Gospel in Foreign Parts is a corporation created by and existing within a foreign jurisdiction, to which they alone are amenable; by reason whereof, at the time of the late revolution of this and of the United States from the jurisdiction of Great Britain, all lands in this state, granted to the Society for the Propagation of the Gospel in Foreign Parts, became vested in this state," etc.

And the act then proceeds to grant the right of the state, so vested in them, to the various towns in which they are situated. So that the title set up by the state is under the society, as a corporation originally capable to take the lands, and actually taking them, and their title being divested and vesting in

the state by the Revolution. In the latter particular, the legislature were mistaken in point of law. This court had occasion to decide that question in *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven*, 8 Wheat., 464, where it was held that the Revolution did not divest the title of the society, although it was a foreign corporation. That case came before us upon a special verdict, which found the original charter of the society granted by William III., and its power to hold land, etc. We do not, however, rely on that finding, as it is not incorporated into the present case; but we think the other circumstances sufficient *prima facie* to establish the right of the society, as a corporation, to hold lands, and particularly the lands in question. In *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 450, the court held evidence far less direct and satisfactory *prima facie* evidence of the corporate character of the plaintiffs. A certificate ought, accordingly, to be sent to the circuit court, in answer to the first question, that the plaintiffs have shown that they have a right to hold the lands in controversy.

§ 613. *The Vermont statute of limitations of 1785 does not protect an ouster by a mere intruder.*

The second point is whether the plaintiffs are barred by the three years' limitation in the act of the 27th of October, 1783, or any other statute of limitations of Vermont. The act of 1785 recites in the preamble that many persons have purchased supposed titles to lands within the state; and have taken possession and made large improvements, etc. It then proceeds to provide in the first eight sections, for the allowance of improvements, etc., to the tenants, in cases of eviction under superior titles. There is a proviso which prevents these sections from extending to anything future. The ninth section is as follows: "Provided always, and it is hereby further enacted by the authority aforesaid, that this act shall not extend to any person or persons settled on lands granted or sequestered for public, pious or charitable uses; nor to any person who has got possession of lands by virtue of any contract made between him and the legal owner or owners thereof." The tenth section provides that nothing in the act shall be construed to deprive any person of his remedy at law against his voucher. The eleventh and last section is as follows: "That no writ of right or other real action, no action of ejectment or other possessory action of any name or nature soever, shall be sued, prosecuted, or maintained for the recovery of any lands, tenements, or hereditaments, where the cause of action has accrued before the passing of this act, unless such action be commenced within three years next after the 1st of July in the present year of our Lord 1788."

Now, in order to avail themselves of the statute bar under this last section, it is necessary for the defendants to show that the cause of action of the plaintiffs accrued before the passing of that act. To establish that, it is necessary to show that there had been an actual ouster of the plaintiffs by some person entering into possession adversely to the plaintiffs. No such ouster is shown upon the facts. It is, indeed, stated "that Edward Clarke, the father of the said Ozias Clarke, went into possession of the said lot in the spring of the year 1780, it not appearing that he had purchased any title thereto, and so continued in possession thereof until the said defendant entered as aforesaid;" that is, under the lease of the town. Edward Clarke is therefore to be treated as a mere intruder, without title; and no ouster can be presumed in favor of such a naked possession. And it is not unworthy of notice that the fourth section of the act of 1785 provided "that no person, who hath ousted

the rightful owner, or got possession of any improved estate by ouster, otherwise than by legal process, shall take any advantage or benefit by this act." So that a plain intention appears on the part of the legislature not to give its protection to mere intruders who designedly ousted the rightful owners.

It is also to be considered that the defendants do not assert any claim of title under him or in connection with him; and the other circumstances of the case lead to the presumption that he never set up any possession adverse to the society's rights; for the possession was yielded without objection to the town, when the act of 1794 enabled the town to assert a title to it.

§ 614. *Statutes of limitations of Vermont of 1785, 1787 and 1797 construed.*

The act of 1785, being then in terms applicable only to cases where the cause of action accrued before the passing of that act, cannot govern this case, where no such cause existed. There is, moreover, another difficulty in setting it up as a bar, if the proviso of the ninth section extends, as we think it does, to every section of the act. It has been argued by the counsel for the defendants that the ninth section ought to be restricted in its operation to the eight preceding sections. But we see no sufficient reason for this. The words are "that this act shall not extend," etc.; not that the prior sections of this act shall not extend, etc. It would be strange, indeed, if the legislature should interfere to prevent any improvements being paid for, in cases of lands granted or sequestered for public, pious or charitable uses; and yet should allow so short a period as three years to bar, forever, the right of the grantees for charity. There are good grounds why statutes of limitation should not be applied against grants for public, pious and charitable uses, when they may well be applied against mere private rights. The public have a deep and permanent interest in such charities, and that interest far outweighs all considerations of mere private convenience. The legislature of Vermont has thought so; for we shall find, in its subsequent legislation, that it has by a similar provision excepted from the operation of all the subsequent statutes of limitation grants to such uses. There is, then, no reason why the court should construe the words of the ninth section as less extensive than their literal import. The case ought to be very strong which would justify any court to depart from the terms of an act; and especially to adopt a restrictive construction which is subversive of public rights, and justified by no known policy of the legislature. We feel compelled, therefore, to construe the words, that "this act shall not extend," etc., as embracing the whole act and carving an exception out of the operation of the eleventh section of it.

Let us, then, see how far any subsequent statute of limitations of the state applies to the case. The next statute in the order of time is the act of the 10th of March, 1787, which provides as follows: "That no writ of right or other real action, no action of ejectment," etc., shall "hereafter be sued, etc., for the recovery of any lands, etc., where the cause of action shall accrue after the passing of this act, but within fifteen years next after the cause of action shall accrue to the plaintiff or demandant, and those under whom he or they may claim. And that no person having a right of entry into any lands, etc., shall hereafter thereinto enter but within fifteen years after such right of entry shall accrue."

This act contained no provision excepting grants for public, pious or charitable uses from its operation. But it contained a proviso that the act should not extend to bar any infant, person imprisoned, or beyond seas, without any of the United States. The act was prospective, and applied only where the

cause of action accrued after the passing of it. This act was superseded and repealed by another act of the 10th of November, 1797, which constitutes the present governing statute of limitations of the state. It contains, however, a proviso, section 13, that the act shall not be construed to extend to or affect any right or rights, action or actions, remedies, fines, forfeitures, privileges or advantages, accruing under any former act or acts, clause or clauses of acts falling within the construction of that act in any manner whatsoever, but that all proceedings may be had, and advantages taken thereon, in the same manner as though that act had not been passed, and that the former act or acts, of limitation, clause or clauses of acts, which are or were in force at the time of passing the act, shall, for all such purposes, be and remain in full force. This proviso preserved the operation and force of the act of 1787 as to causes of action accruing in the intermediate period between the act of 1787 and the act of 1797.

In this view of the matter it is important to consider the entry of the defendant under the lease of the town, on the 16th of April, 1795. If that entry was adverse to the title of the plaintiffs, then the act of 1787 began to run upon it from that period, for the cause of action of the plaintiffs then accrued to them by the ouster.

§ 615. *Though a vendee derives title from his vendor, his entry and possession is for himself, and adverse to the vendor.*

It has been contended by the plaintiffs' counsel that the entry of Clarke, under the lease in 1795, was an entry for the plaintiffs, and in virtue of their title and not adverse to it. We do not think so. The town of Pawlet claimed the right to the property, not as tenants to, or subordinate to the rights of, the plaintiffs, but as grantees under the state. Their title, though derivative from and consistent with the original title of the plaintiffs, was a present claim in exclusion of and adverse to the plaintiffs. They claimed the possession as their own in fee-simple, and not as the possession of the plaintiffs. A vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor. He enters and holds possession for himself and not for the vendor. Such was the doctrine of this court in *Blight v. Rochester*, 7 Wheat., 535, 547, 548. The lessee in the present case did not enter to maintain the right of the plaintiffs, but of the town. He was not the lessee of the plaintiffs, and acquired no possession by their consent or with their privity. This entry, then, was adverse to any subsisting title in them, and with an intention to exclude it. It was therefore, in every just sense, an entry adverse to and not under the plaintiffs.

§ 616. *Exception in favor of persons "beyond seas." Members of a foreign corporation.*

The case, then, falls within the act of 1787, and unless the plaintiffs are "beyond seas" within the proviso of that act, they would, upon the mere terms of that act, be barred. The facts stated upon the record do not enable us to say whether there is absolute proof to that effect. The plaintiffs are a foreign corporation, the members of which are averred to be aliens and British subjects, and the natural presumption is that they are resident abroad. If so, there cannot be a doubt that they are within the exception. If any of the corporators were resident in the United States, then a nicer question might arise as to the effect of the proviso, whether it applied to the corporation itself or to the corporators as representing the corporation. But this it is unnecessary to decide, and on this we give no opinion.

There is the less reason for it, because by a subsequent act passed on the 11th of November, 1802 (long before the fifteen years under the act of 1787 had run), it was provided "that nothing contained in any statute of limitations heretofore passed shall be construed to extend to any lands granted, given, sequestered, or appropriated to any public, pious or charitable uses, or to any lands belonging to this state. And any proper action of ejectment or other possessory action may be commenced, prosecuted, or defended for the recovery of any such land or lands, anything in any act or statute of limitations heretofore passed to the contrary notwithstanding." This act, of course, suspended the act of 1787 as to all cases within its purview. That the grants to the Society for the Propagation of the Gospel were deemed to be grants for pious and charitable uses within it, is apparent from the subsequent legislation of the state, as well as from the objects of the institution. In November, 1819, the legislature passed an act repealing this exception, so far as related to the rights "of lands in the state granted to the Society for the Propagation of the Gospel in Foreign Parts," thus plainly declaring that they were previously protected by it. This repeal cannot have any retrospective operation, as to let in the general operation of the statute of limitations in the intermediate period between 1802 and 1819, but must, upon principle, be held to revive the statute only in future. The present suit was brought in 1824, and the statute period of fifteen years had not then run against the plaintiffs.

§ 617. *The plaintiff being a foreign corporation beyond seas, and created for pious, public or charitable uses, was not at the time of its suit barred by any limitation statute of Vermont.*

It is unnecessary to enter upon the consideration of the statute of limitations of 1797, which contains similar provisions as to this subject with that of 1787, and the exception of persons "beyond seas." Charitable and pious grants were not excepted from its operation, but that defect was cured by an act passed on the 26th of October, 1801, in terms similar in substance to those of the act of 1802, already referred to. The act of 1797 applies in terms only to future causes of action, to causes of action accruing after the passing of the act, and limits the action to the period of fifteen years. If it had applied to the present case, it would have been open to the same reasoning upon the exceptions which have been already suggested in reference to the act of 1787. Upon this second question our opinion is that a certificate ought to be sent to the circuit court that the plaintiffs are not barred by the three years' limitation in the act of the 27th of October, 1785, or by any other of the statutes of limitations of Vermont.

§ 618. *The legislature of a state is competent to regulate and limit the remedy of ejectment, and may deprive the plaintiff in ejectment of the recovery of mesne profits.*

The next point is, whether, under the laws of Vermont, the plaintiffs are entitled to recover mesne profits; and if so, for what length of time. Previous to the year 1797, the English action of ejectment was in use in Vermont, and the common law applicable to it, as well as the action for mesne profits consequential upon recovery in ejectment. By an act passed on the 2d of March, 1797, the mode of proceeding was altered. The suit was required to be brought directly between the real parties, and against both landlords and tenants; and by that and a subsequent act the judgment was made conclusive between the parties. It was further provided that in every such action, if judgment should be rendered for the plaintiff, he should recover, as well his damages as the

seizin and possession of the premises. This provision has ever since remained in full force, and has superseded in such cases the action for mesne profits. In November, 1800, an act was passed, declaring "that in all actions of ejectment which now are or hereafter may be brought, the plaintiff shall recover nothing for the mesne profits, except upon such part of said improvements as were made by the plaintiff or plaintiffs, or such person or persons under whom he, she, or they hold." The act contained a proviso that it should not extend to any person or persons in possession of any lands granted for public or pious uses. This act continued in force until November, 1820, when an act passed containing the same general provision as to the mesne profits; but the proviso in favor of lands granted to pious and charitable uses was silently dropped, and must be deemed to be repealed by implication.

§ 618a. *The treaties with Great Britain of 1783 and 1794 do not apply where the right accrued afterwards.*

The question then is whether the act of 1820 does not take away the right to mesne profits in this case; for the state of facts does not show that any improvements have ever been made by the plaintiffs. The treaty of peace of 1783 (8 Stats. at Large, 80), the British treaty of 1794 (id., 116), do not apply to the case. The right of action, if any, of the plaintiffs, did not accrue until the year 1795. The entry then made by the defendants was the first ouster; and at that time, in the action of ejectment, the plaintiffs could not have recovered any damages, but would have been driven to an action of trespass for mesne profits. The legislature was competent to regulate the remedy by ejectment, and to limit its operation. It has so limited it. It has taken away by implication the right to recover mesne profits, as consequential upon the recovery in ejectment, and given the party his damages in the latter action. It has prescribed the restriction, upon which mesne profits shall be recovered; and these restrictions are obligatory upon the citizens of the state. The plaintiffs have not, in this particular, any privileges by treaty beyond those of citizens. They take the benefit of the statute remedy to recover their right to the lands; and they must take the remedy with all the statute restrictions.

Upon this last question, our opinion is that it ought to be certified to the circuit court that, under the laws of Vermont, the plaintiffs are not entitled to recover any mesne profits, unless so far as they can bring their case within the provisions of the third section of the act of the 15th of November, 1820.

HOGAN v. KURTZ

(4 Otto, 773-780. 1876.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Fictions in pleading in actions of ejectment in the courts of this District are abolished, and the provision is that "all actions for the recovery of real estate in the District shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed" of the same. 16 Stat., 146.

Certain described parts of lot numbered 17, in square 377, according to the recorded plat of the city were, on the 11th of June, 1870, in the possession of the defendant; and it appears that the plaintiffs, claiming to own the premises, sued the defendant on that day to recover the same, alleging that they, on the 12th of October previous, were lawfully possessed of the premises, and

that the defendant then and there unlawfully entered the premises and ejected the plaintiffs therefrom, and that she has ever since and now does unlawfully detain the same, claiming both the property and the right to possess the same.

Service was made; and the defendant appeared and filed two pleas: 1. That she is not guilty in manner and form alleged in the declaration. 2. That the lot of land described is, and was at the time alleged, the property of the defendant, and that being justly entitled to the possession thereof she lawfully entered into the premises.

Issue was duly joined by the plaintiffs; and the parties subsequently went to trial, which resulted in a verdict and final judgment for the defendant. Exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Six errors are assigned by the plaintiffs as follows: 1. That the action is not barred by the limitation of twenty years, the same having been commenced since the act of congress abolishing fictions in pleading in actions of ejectment. 2. That the court erred in admitting evidence to establish adverse possession by the defendant, the statute of limitations not having been pleaded. 3. That the court erred in admitting in evidence the record of the former ejectment suit, the same having been commenced before fictions in pleading in such suits had been abolished, and because the holding of the testatrix of the defendant was in subordination to the heirs. 4. That the court erred in admitting parol evidence to show that the first husband of the testatrix of the defendant, under whom she claims, was duly naturalized. 5. That the court erred in refusing the prayer of the plaintiffs that the statute of limitations did not run against the four grantors of the plaintiffs who were foreigners, and resident beyond seas. 6. That the court erred in refusing to give the prayer of the plaintiffs that they must recover the two-fifths of the property which belonged to their two female grantors, who, having married in 1845, could not be affected by the statute of limitations, it appearing that the second husband of the testatrix disclaimed all title to the premises during their coverture. Exceptions not assigned as error will not be examined.

§ 619. *Effect of abolition of fictions in pleading in action of ejectment.*

Prior to the passage act of the abolishing fictions in pleading in actions of ejectment, it is conceded that the limitation in such cases was twenty years; but the proposition is submitted by the plaintiffs that the act referred to converts the action, where it is brought in the name of the real party, into a writ of right, and that it extends the limitation to the same period as that which is by law allowed for remedies in that form of proceeding. Nothing of the kind is found in the language of the act, and no authorities are cited in support of the proposition, or which give it any countenance whatever. Fictions are abolished where the pleading is in ejectment; but the action of ejectment is not abolished, nor is there any provision in the act making any other alteration in the form of the action than that it shall be commenced in the name of the real party in interest, and against the owner or the party in possession. Jackson on Real Actions, 284.

State laws abolishing such fictions sometimes provide what the effect of the new provision shall be, and it is settled law that the state regulation in that regard is a rule of property which the federal courts must follow. *Miles v. Caldwell*, 2 Wall., 43; *Blanchard v. Brown*, 3 id., 249.

Alterations of the kind, it is usually held, place the final judgment in ejectment upon the same footing as judgments in other actions; but there is no

trace of authority, either in state legislation or in judicial decision, to show that the provision abolishing such fictions in the action of ejectment converts the action into a writ of right, or that the action, when commenced in the name of the real party against the owner or the party in possession, falls under any other rule of limitation than the action of ejectment when commenced in the old form, unless the statute abolishing such fictions contains some provision warranting such a construction. *Barrows v. Kimball*, 4 id., 403. Beyond question, the action is still an action of ejectment, and the plaintiff must still recover on the strength of his own title, and not on the weakness of that of his adversary. *Watts v. Lindsey*, 7 Wheat., 161; *Gilmer v. Poindexter*, 10 How., 267.

§ 620. *Adverse possession may be proved although the statute is not pleaded.*

Evidence to prove adverse possession in an action of ejectment is admissible though the statute of limitations is not pleaded in defense. *McConnel v. Reed*, 4 Scam., 124; *Stearns on Real Actions*, 241. Ejectment cannot be maintained unless it be brought within twenty years next after the right of entry accrued; and it follows that adverse possession in the defendant for twenty years is evidence of title in the possessor, and constitutes a good defense to the action. 1 Chitty, Pl. (16th Am. ed.), 213; *Hallett v. Forest*, 8 Ala., 264; *Hammond v. Ridgley*, 5 Harr. & Johns., 151; *Jackson v. Brink*, 5 Cow., 480; *Briggs v. Prosser*, 14 Wend., 227; *Jackson v. Harder*, 4 Johns., 202.

Adverse possession, under a claim of right, if uninterrupted, open, visible and notorious, may be set up in such an action, not only as a defense to the cause of action set forth in the declaration, but to show the nullity of any conveyance executed by any one out of possession. *Bradstreet v. Huntington*, 5 Pet., 438 (§§ 872-82, *infra*); *Angell on Lim.* (6th ed.), 386; 2 *Greenl. Evid.* (12th ed.), sec. 430; *Hawk v. Genseman*, 6 G. & R., 21.

Two objections were made to the admissibility of the record of the former ejectment suit, as follows: 1. Because the parties were fictitious, the suit having been commenced before fictions in pleading were abolished in such actions. 2. Because the defendant, as the plaintiffs allege, held the premises in subordination to the title of the heirs-at-law.

Sufficient has already been remarked to show that the first objection is without merit, for the reason that the record was not offered or admitted as a bar to the present suit, and also for the reason that it tended to show that the defendant claimed to hold the premises adversely to the heirs; nor is there any legal merit in the second objection, as the question whether the possession of the defendant was or was not adverse to the heirs was plainly a question of fact for the jury, and must be considered as concluded by the verdict.

By the record, it appears that the testatrix of the defendant was twice married; that her first husband immigrated here in the year 1794, married here, purchased the lot in question, and built a house on it as a family residence; that they never had any children, and that he died in 1828, leaving her surviving him; that she married a second husband, whom she survived, and died testate in 1869, devising the property to her sister, the defendant in error.

Throughout her life, subsequent to the decease of her first husband, the testatrix held actual, exclusive, continuous, visible and notorious possession of the property, and the evidence is full to the point that the defendant, as her devisee, continued so to hold the same from the death of the testatrix to the present time. Forty-two years elapsed after the death of the first husband of

the testatrix before the present suit was commenced, the plaintiffs claiming to be collateral heirs, or the representatives of collateral heirs.

Where there are no descendants or kindred of the intestate to take the estate, the law of descents applicable in the case provides that the estate "shall then go to the husband or wife, as the case may be." *Spratt v. Spratt*, 1 Pet., 343. Provision is also made by a subsequent statute, that any foreigner may, by deed or will to be hereafter made, take and hold land within this District in the same manner as if he was a citizen; "and the same lands may be conveyed by him, and be transmitted to, and be inherited by his heirs and relations, as if he and they were citizens." *Same v. Same*, id., 344.

Beyond doubt, the first husband immigrated here from Ireland; but the record shows that he filed his declaration of intention to become a citizen July 11, 1801, six years or more after he arrived here and settled in this district. Documentary proof that he took out his second papers is wanting; and the plaintiffs contend that he could not have been naturalized when he purchased the lot in question, because three years from the time he filed his declaration of intention had not then elapsed, and they refer to the act of the 29th of January, 1795, in support of the proposition. 1 Stat., 414.

Tested by that act the proposition would be correct; but the act of the 4th of April, 1802, provides that any alien, who was residing within the limits and jurisdiction of the United States before the 29th of January, 1795, may be admitted to become a citizen on due proof made to some one of the courts, previously named, that he has resided two years at least within and under federal jurisdiction, and one year at least immediately preceding his application within the state or territory where such court is at the time held. 2 id., 154.

§ 621. *Admissibility of certain parol evidence.*

Proceedings of the kind are required to be recorded; but it was proved or conceded that the records of such proceedings in this District were destroyed many years ago; and in view of that fact, and of the long period between the purchase of the property and the other evidence exhibited in the record, the court left the question whether the party was or was not naturalized to the jury, and they found the issue in favor of the defendant. Seasonable objection was made by the plaintiffs to the admissibility of the parol evidence, and they now contend that the court erred in admitting secondary evidence to prove that that party became a citizen.

Enough appears to show that he possessed every requisite qualification to enable him to become a citizen at any time, and that he constantly exercised rights belonging to citizens; and, in view of the great lapse of time since he acquired the property, the court here is clearly of opinion that the assignment of error must be overruled. Suppose that is so, still the plaintiffs contend that the court erred in refusing the prayer of the plaintiffs that the statute of limitations did not run against the four grantors of the plaintiffs who were foreigners and residents beyond seas.

Persons beyond seas, it is admitted by the defendant, are within the exceptions contained in the statute of limitation originally applicable in this District. Grant that, still the defendant contends that the case is controlled by the more recent act of congress, which provides that all exceptions in favor of parties beyond the District of Columbia, which may, by existing laws, be replied or relied on, in any action or proceeding brought in said District, "are hereby repealed and abrogated," with a saving clause for pending actions, and

such as should be brought within three years from the passage of the act. 13 Stat., 532. Passed as that act was five years before the present suit was commenced, it is clear that the plaintiffs are not within the saving clause, and that the prayer for instruction was properly refused.

Two of the grantors were females, resident abroad, and the record shows that they were married in 1845; and the plaintiffs contend that the court erred in refusing the prayer of the plaintiffs that they must recover the two-fifths of the property which belonged to their two female grantors, who, having been married at the time mentioned, could not be affected by the statute of limitations.

Attempt to take their case out of the operation of the rule applied to the other four grantors is made upon the ground that the second husband of the testatrix disclaimed the title during their coverture, but the better opinion is that his disclaimer did not in any manner affect the possession and claim of the wife, and such, it would seem, must have been the finding of the jury. Concede that, and it follows that the statute of limitations commenced to run seventeen years before the marriage of the two grantors, which brings their case within the established rule, that when the statute has begun to run it will continue to run without being impeded by any subsequent disability. Angell on Lim. (6th ed.), sec. 477; Currier v. Gale, 3 Allen, 328; Smith v. Clark, 1 Wils., 134; Demorest v. Wynkoop, 3 Johns. Ch., 138; Eager v. Com., 4 Mass., 132.

§ 622. *Cumulative disabilities are not allowed.*

Disabilities which bring a party within the exceptions of the statute cannot be piled one upon another, but a party claiming the benefit of the exception can only avail himself of the disability existing when the right of action first accrued. Mercer v. Selden, 1 How., 37.

Possession of an adverse character, and decidedly hostile to the claim of the heirs-at-law, was maintained by the testatrix of the defendant for more than forty years, claiming to own the premises in her own right; and the court here is inclined to concur with the court below that the question whether or not her first husband was ever naturalized is a matter of no consequence, as her possession was not affected by that consideration. No such disability attached to the testatrix; and the evidence is beyond dispute that she was capable of acquiring an interest in the premises by any of the methods known to the laws of the District.

Abundant proofs are exhibited in the record to show that she had been in the possession of the property from the decease of her first husband to the time of her own death, claiming to own it in her own right, and renting it and using it under a claim that it was her own property. Such a possession, so evidenced, usually affords a presumption that the occupant claims the property, and where it is adverse, open, visible and continuous for twenty years, it is sufficient evidence of title to toll the real owner's right of entry, unless he can prove that he was within some one of the exceptions contained in the statute of limitations, even in a jurisdiction where those exceptions are still in force.

Better proof to show that persons claiming title to the premises were notified that her possession was adverse and hostile to their claim can hardly be imagined than what is exhibited in the case before the court. Thirty years before the present suit was commenced, a common-law action of ejectment was instituted for the same premises, in which the father and the grantors of

the plaintiffs were described as the lessors of the fictitious plaintiff in the suit, and it appears that the suit was defeated by the testatrix of the defendant, aided by her second husband, then in full life. Viewed in any light, we are all of the opinion that there is no error in the record.

Judgment affirmed.

MEEHAN v. FORSYTH.

(24 Howard, 175-179. 1860.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—This is an action of ejectment commenced in the circuit court for the recovery of a part of two lots of land in the city of Peoria by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the circuit court (Forsyth) originated in the claim of Antoine Lapance, an inhabitant within the purview of the act of congress, approved March 3, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the state of Illinois," which was surveyed the 1st of September, 1840, by the surveyor of public lands, and for which a patent issued on the 1st day of February, 1847. The plaintiff produced from the surveyor-general's office a certified copy of the survey, according to which the location of the claim was made. This testimony was objected to, but was received by the court, and we think properly. An original of the plan of survey is retained in the office of the surveyor-general, and a copy given by that officer, who is required to keep it, upon general principles is admissible in evidence. *United States v. Percheman*, 7 Pet., 51.

It was agreed on the trial that the defendant Ballance, and those under him, had been in possession of the premises more than ten years before the commencement of the suit. This possession was shown by the facts that he had cultivated a portion of the quarter section described in his patent for more than twenty years, and had resided on the quarter section for twelve years, and had paid taxes upon this parcel of land as a part of the said quarter section, but not as a separate subdivision. The plaintiff had not paid any of the taxes during that period. The defendant Ballance made an entry of the quarter section, of which the lot in controversy forms a part, in 1837, and a patent issued to him in 1838, by which the United States gave and granted to him and his heirs, subject to the rights of any and all persons claiming under the act of congress of 3d March, 1823, before referred to.

The defendant moved the court to instruct the jury that if they believed from the evidence that said Ballance has had the actual possession by residence on the land in controversy for more than seven years, under the title he has exhibited, the plaintiff cannot recover; and that the words in the patent of Ballance of January 28, 1838, "subject, however, to the rights of all persons claiming under the act of congress of March 3, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the state of Illinois,' cannot operate as to lessen the estate vested by the granting part of the deed."

The court declined to give these instructions, but charged the jury: "That to constitute an adverse possession against the French claimants by the possession of another portion of the quarter section by the defendant, as his tenant, entry and possession must have been under a claim of title inconsistent with that of the French claimants. If the entry and possession were subject to the rights

of the claimants existing under the acts of congress, then such possession as stated could not be adverse, so long as that possession did not actually extend to the lots sued for."

The court further instructed the jury: "That when the defendant made application for a pre-emption, he stated it was made subservient to these French claims; and when the patent was issued by the government to him for this fractional quarter, it was made subject to these claims; therefore, the grant made by the government, as contained in the patent, did not necessarily operate as a conveyance of the entire quarter section to the grantee, but the clause inserted in the patent had the effect of excluding from the operation of the grant that portion of the quarter covered by these French claims; consequently, if, at the time of the grant to Ballance, there was any one capable of taking lot 63, under the acts of congress of 1820 and 1823, then lot 63 was excluded by law and by the terms of the grant, and was excepted (in other words, lot 63 was not granted to Ballance), and he took his title subject to such exclusion or exception."

§ 623. *A patent reserving the rights of persons claiming under certain statutes will not prevent the statute of limitations running in favor of the patentee against persons claiming under those statutes.*

We think that the circuit court erred in its interpretation of this patent. The patent recites that "full payment" had been made by the grantee for the southwest fractional quarter of section nine, in township eight north, of range eight east, containing one hundred and forty-seven and forty-three hundredths acres, according to the official plat of the survey of said lands returned to the general land office by the surveyor-general; which said tract has been purchased by Charles Ballance. It proceeds to declare that the United States had given and granted the said tract above described, to have and to hold the same to him and his heirs, subject, however, to the rights of any and all persons claiming, etc. This saving clause was designed to exonerate the United States from any claim of the patentee, in the event of his ouster by persons claiming under the acts referred to, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of congress described in it. The possession of Ballance under this patent was adverse to that of the claimants under the acts of 1820 and 1823, in every case in which their claim was not specifically admitted by him. He was in no sense their tenant, nor did the saving in the act create any fiduciary relation between him and any other person so as to prevent the operation of the statute of limitations. The patent does not impose upon him any duty to recognize these claims. It only requires him to accept the title of the United States with knowledge that such claims exist, and that they do not intend to deny or to destroy them, nor to defend his title against them.

The case of *Bryan v. Forsyth*, 19 How., 334, involved a controversy for a lot in the city of Peoria, similarly situated as that which forms the subject of this suit. The court, in that case, said that a patent with a saving like that we are considering was a fee-simple title on its face, and is such a title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years, as required by the statute of Illinois.

The act of limitations of Illinois (Revised Statutes, 349, sec. 8) protects the claim of a person for lands which has been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that

state or the United States. The title of the defendant and the possession which he was admitted to have had fulfilled the requisitions of the law, and the court should have given the instructions asked for, and erred in giving the instructions submitted to the jury. Judgment reversed and cause remanded. (a)

MEEKS v. OLPHERTS.

(10 Otto, 564-571. 1879.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This action was brought September 30, 1872, by Meeks against Olpherts and others to recover possession of a hundred-vara lot in the city of San Francisco. On a stipulation waiving a jury, the case was submitted to the court, which, on its findings of fact incorporated in this record, further found as a conclusion of law that the plaintiff's action was barred by section 190 of the probate act of California. Judgment was rendered for the defendants. Meeks sued out this writ of error.

The material facts in the case are few and easily understood. George Harlan died intestate July 8, 1850, seized of the title to the lot in question, except as that title may have been nominally in the United States. By the act of congress of 1864 his title was confirmed, and it inured to the benefit of any one rightfully holding under him. On the 19th of August, 1850, Henry C. Smith was duly appointed administrator of Harlan's estate, and having afterwards resigned, Benjamin Aspinall was appointed in his place, June 15, 1855. On the 7th day of January, 1856, Aspinall, by an order of the probate court, sold the lot in question with many others. Under this sale the defendants, or those under whom they claim, entered into possession, which they have held uninterruptedly to the present time. Aspinall remained administrator until May 12, 1864, when he settled up his accounts and was discharged. Joel Harlan and Lucien B. Huff, appointed in his place, are now administrators. On the 6th of November, 1869, an order of distribution of the estate was made in the probate court, by which the lot in question was distributed to plaintiff. To this proceeding no objection is made as to its regularity.

It will thus be seen that the defendants had purchased the lot in controversy at a sale ordered by the probate court, and had paid their money for it, and been in the peaceable adverse possession of it since 1856, a period of sixteen years; and the court held that, whether the probate sale was valid so as to confer title or not, the statute of limitations applicable to such cases was a bar to plaintiff's right of recovery. As the only question in the case is the one thus stated by the circuit court, and as the supreme court of California had decided that the probate sale was invalid and conferred no title, we proceed to examine the defense of the statute.

The special statute of limitations of three years, contained in the probate act of California, is as follows:

"SEC. 190. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale.

(a) The same principle was held in the cases of *Dredge v. Forsyth*,* 2 Black, 563; *Kellogg v. Forsyth*, and *Reynolds v. Forsyth*, 2 Black, 571; *Gregg v. Tessen*,* 1 Black, 150; and *Gregg v. Forsyth*, 24 How., 179, all of which arose under the same patent to Charles Ballance.

"SEC. 191. The preceding section shall not apply to minors or others, under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability."

As the plaintiff in this case claims title as heir and by purchase from other heirs of the decedent, and brings his suit sixteen years after an administrator's sale, sanctioned by a probate court, it would seem at first blush that the case came within the provision of the first section.

Counsel for plaintiff, however, has argued with much earnestness and force:

1. That no suit could be brought by the heirs, or any one claiming through them, until the order of distribution was made, because until that time, or until administration was closed, the right of possession was in the administrator.
2. That until then the heirs were under a disability, which by section 191 protected their right of action from the operation of section 190.

The first proposition, and, indeed, the argument of the learned counsel, concedes that by virtue of the statutes of California the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does, and that while the administrator can only sell real estate upon an order of the probate court, the possession and control, the perception of the rents and profits, and the right to sue to recover possession of it when held adversely, belongs solely to the administrator. Indeed, a section or two of the probate act, which we copy, makes this very plain.

"SEC. 114. The executor or administrator shall have the right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by the order of the probate court to the heirs or devisees, and shall keep in good tenantable repairs all houses, buildings and fixtures thereon which are under his control."

"SEC. 195. *Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.*"

§ 624. *Under the statute of probate in California the administrator is barred by the lapse of three years from bringing an action to recover land of his intestate sold by him.*

And by section 194 of the probate act of California the administrator is again required to "take into his possession all the estate of the deceased, real and personal." While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of the heirs and of the creditors of the estate, and as such had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs, or any one else injured by that failure.

Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by his sale as administrator to the defendants. Instances are numerous of persons making sales that are invalid, avoiding them by the very act of bringing an action of ejectment. Such are

the cases of infants and married women who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowledgments of the deeds.

There was, then, up to the date of the order of distribution, or until it was barred by the statute, a right in the administrator of the estate of Harlan to sue for and recover the possession sought in the present action. This being so, it is not easy to perceive why that right of action was not barred in three years from January 7, 1856, the day on which defendants purchased and took possession. This would make the bar complete January 7, 1859. During all that time Aspinall was administrator and for five years afterwards, and nothing obstructed his legal right to sue for and recover the possession. Nor is the case otherwise if the right of action began with the relinquishment of title by the act of congress of 1864.

It is argued, however, that section 190 does not apply to suits brought by the administrator, and therefore the statute does not run against the right of action while it remains in him. The argument is that the language used, namely, "no such action shall be maintained by *any heir, or other person* claiming under the deceased testator or intestate," means by an heir or one holding under the heir, and that the words "other person" do not include the administrator.

But no sufficient reason is to be found why it should not. If the administrator can by such an action avoid his own irregular or void sale, the reason for limiting the time within which it should be done by him is as strong, or perhaps stronger, than it is against another.

It is as important to the purchaser for whose benefit the statute was enacted, that he should be protected against the administrator as against the heirs. The words "other person" mean some one other than the heirs, and instead of meaning some one like the heirs or claiming under the heirs, the words expressly refer to some one "claiming under the deceased testator or intestate." These last words are unnecessary in reference to heirs, for they can claim in no other way but under the intestate. The words "other person," therefore, almost of necessity refer to the administrator, for they can refer to no one but the heirs or some one claiming under them, or to the administrator.

He is, therefore, within the spirit and literal meaning of that section, and the bar is good against him. This was decided in the case of *Harlan & Huff v. Peck*, in the supreme court of California (33 Cal., 515). Harlan and Peck, as we have already seen, were the successors of Smith and of Aspinall as administrators of George Harlan's estate. They brought suit to recover one of the lots sold by Aspinall at the same time with the sale in question in this case. The defendants relied on the sale and the limitation of section 190 of the probate act. The court below gave judgment for plaintiffs; but the supreme court, while it held the sale void, reversed the judgment, on the ground that this statute of limitations barred the administrator. This is a construction of the statute by the highest court of the state.

§ 625. *What is the disability mentioned in the California statute.*

The legal disability mentioned in section 191 manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves; such as infancy, coverture, and the like. Whatever is a disability under the general statute of limitations is a disability under this statute. Section 352 of the Code of Civil Procedure of California describes this class, among which are minors, *femes*

covert, insane persons and persons imprisoned, and it describes them as persons *entitled* to bring an action. The disability cannot have reference to a person in whom no right of action exists. Such use of the term "disability" is without support in reason or precedent.

§ 626. *When the right of action in a trustee is barred, it is barred in the cestui que trust.*

The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. "In all suits for the benefit of the estate he represents both the creditors and the heirs," said the supreme court in *Beckett v. Selover*, 7 Cal., 215. Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the statute of limitations, the right of *cestui que trust* thus represented is also barred. This doctrine is clearly stated in *Hill on Trustees*, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American. Among those specially applicable to this case are *Smilie v. Biffle*, 2 Pa. St., 52; *Couch's Heirs v. Couch's Administrator*, 9 B. Mon. (Ky.), 160; *Rosson v. Anderson*, id., 423; *Darnell v. Adams*, 13 id., 273.

In the first of these cases land was devised to executors, with a power of sale which was imperfectly executed, by one of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the statute of limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in *Lewellen v. Mackworth*, 2 Eq. Cas. Abr., 579, the court says: "Therefore, where *cestui que trust* and trustees are both out of possession for the time limited, the party in possession has a good title against both. By the terms of the will the trustee had the right to enter on the land, to take the rents, issues and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee-simple and appropriate the interest of the purchase money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the life-time of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He therefore held adversely to both *cestui que trust* and trustee, and consequently obtained by the statute of limitations an indefeasible title, which cannot now be disturbed or gainsaid."

In the case of *Rosson v. Anderson* (*supra*), the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor.

One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the statute of limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors, and, as more than five years had elapsed after they had qualified as such, the statute was a bar against them, and as they would have been barred by the statute, so was the heir, though a minor when the cause of action accrued.

In *Darnell v. Adams* (*supra*), which concerned a devise of slaves, the same

court held that the disability of coverture in the devisee could not prevent the running of the statute of limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which bars the executor. *Coleman v. Walker, etc.*, 3 Metc. (Ky.), 65, and *Edwards v. Woolfolk's Administrator*, 17 B. Mon. (Ky.), 376, are cases which assert the same doctrine, and in the latter the principle is fully and ably discussed and its soundness well maintained.

A very strong case of the same character is that of *Croxall v. Sherrard*, 5 Wall., 268, where a remainder-man was held barred by the statute of limitations of New Jersey on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainder-man brought suit immediately on the death of his ancestor. This was, however, based on the peculiar wording of that statute.

In *Cunningham v. Ashley*, 45 Cal., 485, it was held that an administrator, who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action. On the whole we are of opinion, both upon sound principles of construction, as well as upon the decisions of the supreme court of California construing the statute of the state, that the circuit court was justified in holding that the plaintiffs were barred by the adverse possession of defendants.

Judgment affirmed.

§ 627. The possession of the defendant in ejectment and those in privity with him, to constitute a bar to the plaintiff's right of entry, must have been actual, exclusive, notorious and adverse, or, in other words, it must have been held continuously during the period of twenty years with a manifest intent to claim the land as against the plaintiff and those claiming under him. *Shuffleton v. Nelson*, 2 Saw., 540.

§ 628. In ejectment evidence of possession without a warrant and location is admissible as evidence in support of the plea of not guilty, or defense of title. *Bank of the United States v. Benning*, 4 Cr. C. C., 81.

§ 629. To support the plea of the statute of limitations to an action of ejectment, the defendant must show actual, continuous, exclusive and visible possession of the property sued for, for the statute period. The possession must be adverse, that is, in hostility to the title of the real owner. The defendant must not have held it within the statute period prior to the commencement of the suit, in conjunction with one who was the real owner of it; for the possession follows the title, and if the owner and others are in possession, the law considers the owner to have the possession. *Larwell v. Stevens*, 12 Fed. R., 559.

§ 630. Possession of land by actual residence or by a fence is not the only mode of possession which will enable the possessor to claim title under the statute of limitations. There are many improvements which give notice of occupancy and ownership as fully as a fence. The construction of a dwelling or other house, connected with other improvements, may show as clearly an appropriation of the land as to inclose it by a fence. For this reason the court refused to instruct the jury "that they ought to find for the plaintiffs, unless they find that the defendants have had possession by an actual residence or fence within the patent of the plaintiff, thirty years or more," etc., but gave the instruction after striking out the word "fence," and inserting in lieu thereof the words, "improvements with the intention of taking possession." *Ellicott v. Pearl*, 1 McL., 206.

§ 681. In ejectment, possession, accompanied with a claim of ownership in fee, is *prima facie* evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect, by construction of law, to the acts of the party; but such effect is limited to the claim actually made, and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first. Accordingly, where one claimed title by an Indian deed, confirmed by an agent of the British government, who could

not lawfully have confirmed it, *held*, that no other kind of confirmation and no other deed could be set up to help the possession; and that any presumption of the existence of a deed was to be confined to such an one as was originally asserted. *Sparkman v. Porter*, 1 Paine, 457.

§ 632. Where it appears that parties are seized in fee-simple, this gives them constructive possession and the right to actual possession, which will be presumed until the contrary appears. *Lamb v. Burbank*, 1 Saw., 227.

§ 633. Where there has been mixed possession of the parties, continued contest and litigation for a long time previous to the commencement of the suit, and absence of actual possession by either of a large portion of the property, no prescription can be claimed. *Brownville v. Cavazos*, 10 Otto, 188; 2 Woods, 293.

§ 634. A claim to land is not barred by lapse of time when it has been repeatedly asserted and possession has been taken under it. *Walton v. Coulson*, 1 McL., 132.

§ 635. Possession while recognizing another title is not adverse. *Adams v. Burke*, 3 Saw., 420.

§ 636. A mere non-possession or non-exercise of the right of entry and possession of real estate under a devise short of the period prescribed by the statute of limitations to bar a right of entry does not amount to a renunciation or disclaimer of the devise or proof thereof. *Webster v. Gilman*, 1 Story, 499.

§ 637. Twenty years' possession is not a bar unless the party entered originally under color of title. *Wilkes v. Elliot*, 5 Cr. C. C., 611.

§ 638. It is not incumbent on plaintiff to show possession within twenty years unless or until adverse possession be proved. *Wilkes v. Elliot*, 5 Cr. C. C., 613.

§ 639. If one takes possession of property under a mistake of law, supposing it to be his, and the real owner, standing by, acquiesces, his conduct is a voluntary or confessed ouster on his part, and he cannot afterwards, when he discovers the mistake, say such possession was not adverse. *Roberts v. Moore*,* 3 Wall. Jr., 292.

§ 640. The lapse of time limited by the statute of limitations vests a perfect title in the possessor. *Leffingwell v. Warrea*, 2 Black, 599.

§ 641. Possession, to operate as a bar, must be adverse to the right asserted. *Miller v. Lindsey*, 1 McL., 32.

§ 642. One who holds by naked possession against the real owner must establish such possession by strict proof. *Jackson v. Porter*, 1 Paine, 478.

§ 643. Adverse possession will not prevent the operation of a devise. *Waring v. Jackson*, 1 Pet., 570.

§ 644. Where a party is estopped *in pais* the statute of limitations perfects the title against him. *Morgan v. Railroad Co.*, 6 Otto, 716.

§ 645. Laches in a warrant holder in perfecting his title will not affect him as against the proprietary, unless he took advantage of it by granting a vacating warrant; but a person having a legal title, who goes forward and perfects it, will prevail against the elder equitable title, which is obnoxious to the charge of laches, unless the former had notice of the prior equitable title; and the court will, in ejectment, notice these titles. *Holtzapple v. Phillibaum*, 4 Wash., 856.

§ 646. Continuous possession.—Parties claiming title by adverse possession, without color of title, must show not only that their possession has been adverse, but that it has been continuing during the statutory period. *Griffith v. Bradshaw*, 4 Wash., 171.

§ 647. Presumption of a grant may arise from lapse of time, but it may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are entirely consistent with the non-existence of the grant, nor where the claim is at variance with the supposition of a grant. Such a presumption will not arise where the relation of vendor and vendee did not exist, and the titles were acquired from different sources. So a jury was charged in an action of ejectment for the recovery of certain land in Ohio. The plaintiffs claimed under a patent from the United States. The defendant gave in evidence a copy of a survey made in 1797 for Ransdale, and a certificate from the land office as to the procurement of a patent, alleged to be lost; a tax receipt of 1801; a copy of a warrant issued to Ransdale, and of a patent from the state of Kentucky, where part of the land under the warrant was situated. The land had been held by Ransdale in 1805. *Ransdale v. Grove*,* 4 McL., 282.

§ 648. Bonds for conveyance to county justices cannot confer a legal title; yet they are evidence to corroborate a twenty years' possession against the right of entry of the obligor or his heirs. *Sargeant v. State Bank of Indiana*, 12 How., 871.

§ 649. Mere possession and receiving the profits, or offers to sell, or partial sales actually made, are not sufficient to authorize the presumption of a conveyance. *Delancey v. M'Keen*, 1 Wash., 354.

§ 650. Lapse of time may authorize the jury to presume a deed; but the presumption may be repelled. *Hurst v. M'Neil*, 1 Wash., 80.

§ 651. An unmolested possession for thirty years will authorize the presumption of a grant. Under peculiar circumstances a grant has been presumed from a possession less than the number of years required to bar the action of ejectment by the statute of limitations. *Barclay v. Howell's Lessee*, 6 Pet., 498.

§ 652. A presumption of title may arise from lapse of time and circumstances, which may be rebutted; when an individual has been in possession of the property, and there are no facts which go to rebut the presumption, whether a title may be presumed or not is a question for a jury. A jury was so charged where an action was brought to recover land, owing to the failure to pay the consideration in full. The plaintiffs were the heirs of James Baird, to whom a patent was issued in 1847. He had located the land and sold in 1824, to Duncan, who, it was alleged, never paid the full amount of the consideration. The defendants took possession in 1840, claiming remotely under Duncan, and relied on a presumption of a deed to him. The jury found for plaintiffs. *Baird v. Wolfe*,* 4 McL., 549.

§ 653. Whether a deed is to be presumed from long possession is a mixed question of law and fact, and in most if not all cases to be submitted to the jury under the advice of the court. The existence of the deed is a fact for the jury, but its legal effect and operation a question of law for the court. *Sparkman v. Porter*, 1 Paine, 457.

§ 654. Adverse possession by guardian.—A guardian, claiming under a deed from a third person, and being in possession receiving the rents and profits, may set up his possession as adverse to his wards, who claim by descent from one once the lawful owner. Mary M. Selden was seized and possessed of certain lands in Virginia, and married Mann Page, who died in 1779, leaving his widow and three infant children surviving. In 1782 she married Wilson C. Selden, who entered on the land in the right of his wife. Selden soon after became the guardian of the children. In 1784 Selden and wife conveyed the land in fee to Cary Selden, with the exception of one-half deeded to W. B. Page, one of the sons. In 1785 the land was reconveyed to W. C. Selden. Both the deeds were recorded in 1818. In 1787 Mrs. Selden died, having executed a new deed to W. B. Page for his half, and a deed of the residue to Mackay. Mackay reconveyed to W. C. Selden. Selden continued to hold possession after his wife's death, taking the rents and profits to his own use, claiming the land under the above deeds. Between 1796 and 1812 Selden sold parcels to various persons, among them Thomas Swann, the husband of Jane B. Page, daughter of Mrs. Selden. They were married in 1794, while Jane was a minor. She died in 1812, leaving seven infant children as her heirs. In 1796 Swann executed a receipt to Selden fully discharging him as guardian. In 1792 John Page had executed a similar release, being then of full age. In 1794 W. B. Page executed a similar release. John Page died in 1800, leaving his estate, on his widow's death, to two of the children of his brother and three of the children of his sister. In 1819 a suit instituted by the heirs of Mrs. Swann against Selden, claiming the land, was dismissed; and the present suit was subsequently instituted. It was held that their rights were barred. *Mercer v. Selden*,* 1 How., 37.

§ 655. Suit does not interrupt quiet possession.—The institution of a suit to recover lands in which the plaintiff fails does not interrupt the quiet, peaceable and actual possession and seizin of the defendants, even where that suit is between the same parties and for the same land, afterwards in contestation; nor does it show that the title or possession of the party seized is defective. So held in an action in equity to recover certain lands in Rhode Island on the ground of fraud. The defendants had been in possession adverse to claimant, and those under whom she claimed, for eighty years. An action had been instituted in 1797, seeking to recover the lands, brought by other heirs for the same cause, in consequence of inquiries made by plaintiff and the plaintiffs therein, and renewed and continual claims had been made by certain heirs, among them the plaintiff, for their portion of the land. *Moore v. Greene*,* 2 Curt., 202; affirmed, 19 How., 69.

§ 656. Continuity not broken by leases made and rent received by guardian by nurture. The receipt of rent by a guardian by nurture, which is jointly due her and the heirs, is not a disseizin or ouster of the heirs. The rent so received would have to be accounted for by the guardian. The continuity of the adverse possession of the heirs and their ancestor is not broken by such receipt and leases made by the guardian. *Reed v. Proprietor of Locks and Canals on Merrimac River*,* 8 How., 274.

§ 657. Judgment does not break the continuity.—A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the statute of limitations, but it must be followed up by a change in the possession. So held in a writ of restitution brought by a tenant, who was evicted in November, 1829, on a judgment of ejectment obtained in November, 1818. The statute of Kentucky bars the right of entry after seven years. *Smith v. Trabue*,* 1 McL., 87.

§ 658. **In bankruptcy.**—The eighth section of the bankrupt act of 1841, limiting suits concerning the estates of bankrupts by assignees against persons claiming adversely, and by such persons against assignees, to two years after decree of bankruptcy or first accrual of cause of suit, cannot affect any suit, the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession. *Banks v. Ogden*, 2 Wall., 57.

§ 659. **Landlord and tenant.**—Where the original possession of a tenant is in subordination to the title of another (the lawful owner), but not in privity to it, and he holds over after his own right to occupy has ceased, the statute of limitations does not begin to run in his favor until a surrender of the possession, or the possession becomes tortious and wrongful by disloyal acts so open, continued and notorious as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner. *Zeller v. Eckert*,* 4 How., 289.

§ 660. Although the general rule is that the tenant shall not dispute his landlord's title, yet if a tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, such disclaimer puts an end to the tenancy; the tenant becomes a trespasser, and thereafter may hold adversely to the landlord. *Walden v. Bodley*, 14 Pet., 156.

§ 661. Upon the disavowal of the landlord's title the relation of landlord and tenant ceases, and the tenant as between them becomes a trespasser; the statute of limitations begins to run, and the landlord may sue at once for the possession, and need not wait for the expiration of the lease. *Merryman v. Bourne*, 9 Wall., 592.

§ 662. A tenant who relies upon the statute of limitations in virtue of his right as a purchaser must claim by deed. *Denn v. Ried*, 10 Pet., 524.

§ 663. Where the defendant entered into possession of premises, as tenant of the lessor, under an agreement to pay a stipulated rent, and continued to hold possession of the same until the time of the lessor's decease, the fact that he allowed the taxes to remain unpaid until the premises were sold at tax sale, when he became the purchaser, and as such denied the title of his landlord, is not sufficient to support the defense of limitation in an action brought by the heirs of the lessor to compel defendant to account for ren's and profits. *Williams v. Morris*, 5 Otto, 444.

§ 664. **Boundary.**—Where a boundary is disputed between parties who own adjoining tracts of land, and they agree to erect a fence on what is supposed to be the true boundary, and the possession continues according to that line for twenty years, in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one and to conclude persons claiming under them by subsequent conveyances. *Wakefield v. Ross*, 5 Mason, 16.

§ 665. Where parties acquiesce in a division line for the period fixed by the statute of limitations, during which adverse possession must be maintained to gain title thereby, they are estopped from asserting that such line is not the true one. *Brown v. Lute*, 2 Fed. R., 440.

§ 666. **Donation act.**—One setting up title by adverse possession against a settler claiming title under the donation act cannot avail himself of possession taken prior to September 27, 1850, because the statute of limitations could not commence to run against such settler until the legal title had passed to him from the United States, as provided in the act of September 27, 1850. *Shuffleton v. Nelson*, 2 Saw., 540.

§ 667. The purchaser of land who takes a quitclaim deed, with a covenant on the part of his grantor to convey to him the legal title as soon as he, the grantor, shall obtain it from the United States, and, having performed all the conditions of the sale, enters into possession, is entitled, from September 27, 1850, the date when his grantor acquired legal title under the donation act, to a conveyance in equity of the legal title. Thereafter his possession may become adverse to that of his grantor, and in the absence of any proof to the contrary should be presumed to be so. *Ibid.*

§ 668. A settler under the donation act (9 Stat., 497) has a present grant by force and operation of such act from the date of his settlement, unless such settlement preceded in point of time the passage of the act, in which case the grant takes effect from the date thereof and not before. Hence his right to possession is not barred by lapse of time, unless the party seeking to take advantage of such bar can show a continuous adverse occupation of the premises for twenty years by him or those with whom he is in privity, since the settler acquired his seizin, either at the time of settlement or the passage of the act, as the case may be. *Mizner v. Vaughn*, 2 Saw., 269.

§ 669. **Entry.**—The same length of possession in the plaintiff in ejectment, which in the defendant would amount to a bar, is in the plaintiff a sufficient title for him to recover on. To avoid the force of it, the other side must prove that he brought suit or made an actual entry on the land within the time the law prescribes. *Holtzapple v. Phillibaum*, 4 Wash., 336.

§ 670. To avoid the bar of the statute of limitations in ejectment by entry, the opposite party must prove that he made the entry with intent to claim the possession, and that he did

some act indicative of such intention, or that he declared that he did enter for the purpose of claiming or taking possession. *Ibid.*

§ 671. Proof that the party claiming the land "attended every year on the land, prosecuting and claiming his title to it, that the witness was with him every year on the land, but could not remember what he said when he was there," is not sufficient evidence of a legal entry to avoid the statute of limitations. *Ibid.*

§ 672. Void deed.—The fact of possession and the *quo animo* of the possessor are the tests by which to determine the question whether the possession is adverse or not. Possession may be adverse and under color of title, although the deed under which the possessor claims is void by reason of its being forged. *Bunce v. Gallagher*, 5 Blatch., 481.

§ 673. Vendor and vendee.—A grantor seeking to establish title by adverse possession to land, of which he has given a warranty deed to another, must establish his adverse holding by clear and undoubted testimony showing a change in the relations of the parties toward the land. Where the evidence simply shows that the grantor inclosed his grantee's lands with other lands owned by him, the presumption of law is that, as to the portion he had sold and conveyed, he was in possession in amity with, and in subservience to, the title he had given. *Jones v. Miller*, 3 Fed. R., 381.

§ 674. The adverse holding of a grantor who has given a warranty deed must be established by clear and undoubted possession. *Jones v. Miller*, 1 McC., 535.

§ 675. The actual possession necessary to avoid the deed of a grantee not in possession must be adverse possession with color of title. *Granger v. Swart*, 1 Woolw., 88.

§ 676. Possession, under a contract of purchase to be paid for in work, cannot ripen into a title by lapse of time, as no conveyance can be claimed until the work is done. The possession of the vendee under such a contract is the possession of his vendor and is measured by the nature of his entry and claim. So held in a suit for an injunction and asking that certain incumbrances paid off by the complainant on land purchased be set off against a judgment for the purchase money. *Alexander McLaughlin*, a tenant in common of complainant's grantor, contracted to sell his interest in the land to one Kirkland, in exchange for work. Kirkland entered and occupied part of the land, and later the land was sold for taxes, but the sale was void. The complainant purchased the right of Kirkland, who claimed to own in fee and the tax title. It was held that he should pay the consideration and rely on his warranty for incumbrances. *Stansbury v. Taggart*, * 3 McL., 457.

§ 677. Conveyance by one disseized.—Where a party is disseized he cannot convey by a quitclaim deed his title to the premises of which he is disseized. *Wakefield v. Ross*, 5 Mason, 16.

§ 678. A possession without claim of title can afford, from mere lapse of time, no presumption of right. *Taggart v. Stanbery*, 2 McL., 543.

§ 679. An entry upon and possession taken of land without title or claim or color of title does not constitute such adverse possession as to cause the statute of limitations to run in favor of the person thus taking possession. Such occupation will be deemed subservient to the paramount title. *Harvey v. Tyler*, 2 Wall., 328.

§ 680. Where one enters upon and takes possession of land without title or claim or color of title, his occupancy is not adverse to the paramount title, but subservient thereto. *Ibid.*

§ 681. Water.—The use and appropriation of flowing water to which another is entitled, will not be deemed to be adverse until it amounts to an actionable invasion of his right. To establish such adverse appropriation it is not sufficient to show a use of the water in a particular way, but it must also appear that such use caused such injury as would justify an action for its redress. *Union M. & M. Co. v. Ferris*, 2 Saw., 176.

§ 682. Prescription will not establish the right to overflow the lands of another under twenty years. *Pumpelly v. Green Bay Co.*, 18 Wall., 181.

§ 683. One does not lose his right to water as owner, except by twenty years' adverse possession. *Stillman v. White Rock Manuf. Co.*, 3 Woodb. & M., 550.

§ 684. Question for jury.—Whether or not the proof shows an adverse possession in a particular case is a question for the jury to determine, under the instructions of the court as to what constitutes such a possession. *Shuffleton v. Nelson*, 2 Saw., 540.

§ 685. It is error for a judge to leave the question of adverse possession to the jury where documentary evidence shows that the plea cannot be sustained. *Chandler v. Van Roeder*, 24 How., 224.

§ 686. Devise without title.—A. attempted to dispose by will of real estate to which, at the date of the devise, he had not a good title, but of which, nevertheless, he had an actual, notorious and continuing possession, and one that by time might have ripened into title, and under which possession and pretense of title he claimed entire ownership. Held, that a devise under such circumstances cannot carry the estate as real estate owned at the date of the will; and further, that a good title, acquired subsequently to the date of the devise, will not be at-

tracted nor cohere to the old claim or imperfect interest so as to be merged or extinguished in it, so as to pass the estate as real estate acquired previously to the date of the will. *Girard v. The City of Philadelphia*, 2 Wall. Jr., 301.

§ 687. **Public lands.**—Persons entering upon lands belonging to the state are to be deemed mere intruders; yet, as against all other persons, the entry will be sufficient seizin to support a writ of right. *Thomas v. Hatch*, 3 Sumn., 170.

§ 688. A disseisor in possession has a lawful estate which he may alien, and his alienee will have a good title as against all persons not having a paramount title. *Flagg v. Mann*, 2 Sumn., 486.

§ 689. A mortgagee will not be permitted, in a court of equity, to set up an adverse possession to bar the right to redeem of his mortgagor, or of purchasers under him, unless the possession has been for twenty years, which constitutes an equitable bar from lapse of time. *Gordon v. Hobart*, 2 Sumn., 401.

§ 690. **Doubt as to location of land.**—A party held adverse possession of a tract of land which by the compact of 1802, settling the boundary between Virginia and Tennessee, was located in the latter state. In an action of ejectment brought against such party in 1807, the statute of limitations was pleaded. *Held*, that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the land in controversy was always within the original limits of Tennessee; and that the statute could not begin to run until it was ascertained by the compact of 1802 that the land fell within the jurisdictional limits of Tennessee. *Robinson v. Campbell*, 3 Wheat., 212.

§ 691. **Husband's life estate.**—Where a husband has a life estate and his wife the remainder, the statute of limitations runs against him, but not against his wife in respect to her remainder. *Stubblefield v. Menzies*, 11 Fed. R., 273.

§ 692. **California.**—Section 7 of the California statute of limitations as it existed prior to the amendment of 1863 had no application whatever to actions for the recovery of lands, section 6 being the only section applicable to such actions. Under such latter section a party claiming title derived from the Spanish or Mexican government can maintain his action, if commenced at any time within five years after the final confirmation of his grant by the government of the United States. *Bissell v. Henshaw*, 1 Saw., 553.

§ 693. The proviso to the sixth section refers to the plaintiff's title and not to that of the defendant. Under this provision it matters not how long the defendants may have been in possession, or under what character or title they claim, if the plaintiff commences his action within the time prescribed after a final confirmation of his own title. *Ibid*.

§ 694. Under the rulings of the supreme court of California, "final confirmation" as used in the statute as amended in 1855, in cases where the survey is not confirmed by the district court under the act of 1860, is the issuing of the patent, and the statute commences to run only from the date of the patent. But where the survey is finally confirmed by the courts, under the act of congress of June 14, 1860, the final confirmation is the date when the decree of the court approving the location becomes final. Section 7 of the statute of limitations of 1863 adopted by express provision these definitions, thus laid down by the court, of the term "final confirmation" as used in the statute. *Ibid*.

§ 695. "Rodeo boundaries," under the customs and acknowledged usages which prevailed in California, constituted as notorious evidence of the possession of land as the cultivation or fencing in an old, settled country. *Boyreau v. Campbell*, 1 McAl., 119.

§ 696. Under the law of California, no one can acquire by adverse occupation as against the public the right to a street or square dedicated to public uses. *Grogan v. The Town of Haywood*, 4 Fed. R., 161.

§ 697. **Florida.**—The law of 26th May, 1830, providing for the final settlement of certain land claims in Florida, is a re-enactment of the act of 23d May, 1828, and required claims to be presented within one year, and a positive bar was interposed in case of failure. *United States v. Marvin*, 8 How., 620.

§ 698. **Georgia.**—The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless one is in possession adverse to the true owner. *Shearman v. Irvine*,* 4 Cr., 367.

§ 699. **Iowa.**—The right of entry under a tax deed, in Iowa, is barred after five years if possession of the land has never been taken. In 1874 one Barrett brought an action to recover real property in Iowa, claiming under a tax deed dated and recorded in 1868. The Iowa statute limits the time to bring an action for the recovery of real property sold for the non-payment of taxes to five years after the execution and recording of the treasurer's deed. Holmes had taken possession in 1875, up to which date the land had been unoccupied, and pleaded the statute in defense. It was held that Barrett was barred. *Barrett v. Holmes*,* 12 Otto, 651.

§ 700. **In Kentucky**, a purchaser who has obtained a conveyance holds adversely to the vendor and may controvert his title and may fortify his own title by the purchase of any other

which may protect him in the quiet enjoyment of the premises. An inclosure is not necessary to show possession under statute of limitations. *Watkins v. Holman*, 16 Pet., 54.

§ 701. Under the Kentucky statute of limitations possession for twenty years, and ten years since death of ancestor, without entry by latter or claimants under him, is a bar. *Sicard v. Davis*, 6 Pet., 140.

§ 702. Under the decisions of the Kentucky courts (which are in such cases adopted as the rule in this court), an entry is necessary to give title under a military warrant, and claimants without such entry are subject to the bar of the statute of limitations. *Potterfield v. Clark*, 2 How., 76.

§ 703. Louisiana.—A petitory action was commenced by the heirs of Thomas Anderson to recover a lot in New Orleans, of which, they averred, he died seized. The lot had been sold by the city to Sticher and Anderson in 1810. The consideration was to remain a charge upon the land, and the interest was to be paid in instalments. Upon a failure to pay two of these instalments the city was authorized to proceed judicially for the recovery of possession and damages. The city, in 1816, sold the same lot to Clay, and, in 1823, it was conveyed to defendants. The defendants pleaded prescription and undisputed possession for thirty years. It was held that the contract could not be dissolved without some judicial proceeding, and a dissolution could not be inferred from the subsequent sale by the city; that recitals in the acts of defendant that possession had been delivered were not evidence of that corporeal possession which is the foundation of a prescriptive right. *Anderson v. Bock*,* 15 How., 323.

§ 704. Ten years' possession of land in Louisiana, before the same had been surveyed and laid out into ranges, townships, etc., is not sufficient to bar a suit by prescription and limitation under the Louisiana law, as the survey settled the rights of parties in such townships, all persons occupying the lands prior to such survey being merely trespassers upon land belonging to the government. *Jourdan v. Barrett*, 4 How., 169.

§ 705. By the law of Louisiana possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner, with interest on the amount expended thereon, and are chargeable with rents on the property, with interest from the date of their receipt. *Gaines v. New Orleans*, 1 Woods, 104; *Jackson v. Ludeling*, 2 Woods, 234.

§ 706. By the law of Louisiana possessors in bad faith cannot claim the benefit of prescription with regard to rents and profits any more than with regard to the land itself. *Gaines v. New Orleans*, 1 Woods, 104.

§ 707. Missouri.—To acquire title by adverse possession in Missouri, the claimant must have had, at least, ten years' actual, continuous, exclusive, open and notorious possession of the property with intent to acquire title thereby. If the possession is held by the indulgence and consent of the owner, and it was so understood and acquiesced in by both parties, the possession will not be adverse. *Larwell v. Stevens*,* 2 McC., 311.

§ 708. Montana.—Under the Montana statute of limitations, approved January 11, 1872, the plaintiff seeking to recover claims upon quartz lodes must prove that he or his assigns or predecessors in interest were in the actual seizin or possession of the lode claim within one year next before the commencement of the action, the legal presumption of such possession resulting from the seizin in law not being sufficient. *Davis v. Clark*,* 2 Mont. T'y, 394.

§ 709. New Jersey.—The possession of lands by an agent or manager is an actual possession within the meaning of the thirty years' statute of limitations of New Jersey, and constitutes an adverse possession as against a co-tenant. *Roberts v. Moore*,* 9 Am. L. Reg., 25.

§ 710. The statute of limitations of 21 James 1, of twenty years, was not adopted in New Jersey. Sixty years' actual possession of any lands uninterruptedly continued perfects a title to the lands under the act of 5th June, 1787. Thirty years' actual and continued possession founded on a proprietary right, duly laid and recorded agreeably to law, is a sufficient bar to all prior rights, titles and claims not followed by actual possession. So a jury was charged in an ejectment suit for lands in New Jersey, brought by the heirs of John Kyd. Kyd had, in 1750, by his will, settled the lands upon his son Isaac in fee tail. In 1733 Isaac conveyed the land in fee to Joseph Sharp, the ancestor of defendant. Sharp had a title by survey, which related back to 1753. The plaintiff failed to make out a title out of the proprietaries. *Gardner v. Sharp*,* 4 Wash., 609.

§ 711. Under the statute of limitations of New Jersey, passed in 1799, section 10, if adverse possession is acquired against a tenant in tail, and be maintained during the life of such tenant, and after his death against the issue in tail, it is only necessary, in order to bar the rights of such issue, that the occupancy before the death of the tenant, and that maintained after his death, taken together, equal the period mentioned in the statute. It is not necessary to bar such issue that the statute run against him for the full period after his rights have accrued upon the death of the tenant in tail. *Wright v. Scott*, 4 Wash., 16.

§ 712. The statute of New Jersey making no qualifications or exceptions as to issue in tail,

thirty years, adverse possession by a *bona fide* purchaser of a party in possession and supposed to have a valid title (such title proving to be a vested remainder), is a complete bar under said statute as against such issue in tail. *Croxall v. Shererd*, 5 Wall., 268.

§ 713. *New York*.—The act of New York of 1788, declaring that after the year 1800 no action for the recovery of lands shall be maintained unless on a seizin or possession within twenty-five years next before such action brought, is valid even if applied to a seizin existing at the time the law was passed, and in such case, where the demandant counted on the seizin of his ancestor within sixty years then last past, it was held that the count was bad. *Bockee v. Crosby*, 2 Paine, 432.

§ 714. To sustain an action of ejectment an averment of seizin is essential, and it must be alleged to have been within the time limited for bringing the action. *Ibid*.

§ 715. *North Carolina*.—Exclusive possession for thirty-three years is a conclusive bar in North Carolina, and an eviction after that period will not be presumed to be from defect in the grantor's title. So held where Hamilton, in 1772, conveyed and delivered possession of certain lands in North Carolina to Somerville, with a covenant against incumbrances. The land passed, after several conveyances, by devise to Hill. All the grantees and Hill continued in possession until they conveyed the same. Hill was ousted by an ejectment suit commenced in June, 1804, of which suit Hamilton was notified. Subsequently, Somerville's executors commenced this suit against Hamilton on his covenant. *Somerville v. Hamilton*, *4 Wheat., 280.

§ 716. *Oregon*.—Under section 42, chapter 5, of the Oregon code of 1854, property sold by an administrator on the order of a probate court to pay the debts of the decedent could not be recovered by any one claiming under such decedent after a period of three years; but in all other cases where defendant claims real property under sale by an administrator, no lapse of time short of twenty years is a bar to an action for the recovery of such property. *Wythe v. Myers*, 8 Saw., 593.

§ 717. *Pennsylvania*.—No person claiming, or who has claimed, title under Connecticut, can, at any time, set up a title by length of possession as a bar, or as a ground for recovery in ejectment in Pennsylvania. *Fellows v. Pedrick*, 4 Wash., 477.

§ 718. Where a decision was rendered by the supreme court of Pennsylvania that a devise over under a particular will never took effect in 1795, and an action of ejectment was commenced about fifty years afterwards, claiming that a devise over did take effect, it was held that the long acquiescence, irrespective of the merits, was a bar. *Doe v. Watson*, 8 How., 268.

§ 719. The possession not being adverse, the Pennsylvania statute of limitations of 1705 is inapplicable to ejectment suits for the recovery, for unpaid purchase money, of lands within the manors, under warrants from the proprietaries. *Kirk v. Smith*, 9 Wheat., 241.

§ 720. The provision in the act of assembly of Pennsylvania of 1785, that fifteen years' possession shall be sufficient to bar an action of ejectment, only applies where the possession had commenced when the law was passed. *Griffith v. Bradshaw*, 4 Wash., 171.

§ 721. *Rhode Island*.—Actions of formedon are within the statute of Rhode Island for quieting possessions, and if a tenant and those under whom he claims have held the seizin and possession of lands for twenty years as tenants in fee, a good bar will arise. If the time limited has once run against any tenant in tail, it is a good bar, not only against him, but also against all persons claiming in the descent *per formam doni* through him. So held where an action of formedon in descender was brought, in which the demandant founds upon a devise in 1741 to his ancestor in fee tail general, and there was a descent cast in 1808, to which the plea was that the tenants held for twenty years and more preceding the 28th of April, 1785, and from that time down to the date of the writ, to which a replication was made which was held bad. *Inman v. Barnes*, *2 Gall., 314.

§ 722. *Texas*.—Where an action of trespass was brought to try the title to certain lands in Texas, which complainant claimed by adverse possession, and the statute of limitations required a possession of ten years to give title, and it was proved that the possession commenced in the summer of 1832, and the pleading alleged it to have continued until the death of Mrs. K., on "the — day of —, 1862," and the evidence tended to show that Mrs. K. died in the spring of 1862, held, that sufficient adverse possession was not made out. *Groscholz v. Newman*, 21 Wall., 481.

§ 723. Under the law of Texas if a person acquires and holds possession of land in good faith, believing it to be his own or to belong to the person of whom he holds it, he is entitled to be paid for the permanent and valuable improvements made by him thereon, though his title proves to be invalid; but after the party having the better title makes a judicial demand by bringing suit to recover the property, the person in possession, or any one taking possession under the same title during the pendency of the suit, can no longer set up the plea of good faith. *Campbell v. Brown*, 2 Woods, 349.

§ 724. *Tennessee*.—The act of the Tennessee legislature of 1850 (Code, § 2481), whether the marriage took place before or after the act, operates to save any bar of the statute of limita-

tions as against the wife's equitable remedy to recover lands conveyed by her husband without her joining in the conveyance in the manner prescribed by statute for the conveyance of a married woman's land, although there may have been a joint disseizin of the husband and wife prior to the passage of the act, and regardless of the question whether any interest passed by the husband's deed to the purchaser, until three years after discoveriture, except where the bar had given the disseizor a title perfected by lapse of time before its passage, or where there was an outstanding trustee capable of suing. Thus where husband and wife were married prior to the passage of the act of 1850, and the husband attempted to convey the wife's land to a purchaser by virtue of power of attorney which was void as to the wife, and such purchaser entered upon the premises and maintained adverse possession for a period longer than that required by the statute of limitations to give good title, *held*, that the wife's equitable right to recover the lands was not barred, her bill having been filed within three years after the death of her husband; and that this right was unaffected by the question whether the husband's deed estopped him from suing singly or jointly with her, or whether, by such deed, his interest passed to the purchaser. *Partee v. Thomas*, 11 Fed. R., 769.

§ 725. Where the husband who holds the legal title as trustee for his wife who has an equitable life estate, attempts to convey both the legal and equitable title by joining with his wife in a deed which is void as to her, he estops himself from suing alone for her or jointly with her, and for that reason the statute of limitations will not bar her suit for recovery until three years from discoveriture. *Ibid*.

§ 726. The Tennessee statute of seven years' possession does not begin to run until there is an adverse legal title; but where the beginning corner of plaintiff's land was in the Indian boundary, the fact that congress had passed an act providing for the punishment of any one who should survey, or attempt to survey, lands belonging to any Indian tribe, did not prevent the statute from running against such plaintiff, the defendant, the adverse possessor, having settled upon plaintiff's tract, the beginning corner of which was in the Indian country, outside of the limits of the Indian boundary. *M'Iver v. Reagan*,* 1 Cooke (Tenn.), 366.

§ 727. A trespasser cannot gain title by possession under the Tennessee seven years' statute of possession. Thus, where a defendant in ejectment set up the statute, claiming to have acquired possession from a third party who held a grant to the land in question, *held*, that the defendant, to claim the benefit of the statute, must show that he took possession of the land with the consent or approbation of such third party. *Ibid*.

§ 728. Virginia.—Five years' adverse possession of a slave in Virginia gives a good title upon which trespass may be maintained. *Brent v. Chapman*, 5 Cr., 358.

2. Adverse Possession in Suits in Equity.

SUMMARY — *Equitable or trust estates*, § 729.—*Equity follows the law*, §§ 730, 731.—*Landlord and tenant*, § 732.—*Trusts in realty*, §§ 733, 734.

§ 729. Clear adverse possession of land for thirty years without the acknowledgment of any equity or trust estate in another will constitute a bar to that equity or trust estate, in a suit in equity, independently of the statute of limitations. So held where one Bartle obtained title to a certain lot in Cincinnati by certificate in 1790, which was transferred to plaintiff in 1827. Bartle had executed a mortgage to one Barr. Charles Vattier purchased the mortgage from Barr and obtained possession from the tenants of Bartle, and the legal title in 1797, and had remained in possession adverse to plaintiff's assignor since that date. *Piatt v. Vattier*, §§ 735-36.

§ 730. A court of equity will follow the statute of limitations in actions affecting real property unless there is some special ground, as fraud, appealing to the conscience of the court. An equitable title is barred after the same lapse of time as would bar the legal title. Suit in equity to compel the defendants to disclose their titles and surrender possession of certain premises in Kentucky. The complainants deraigned title from Henry Miller, who made an entry of the lands in 1782. A survey was made in 1804 and a patent issued in 1820. Miller died in 1796. The defendants claimed under an entry made in 1780 by Nicholas McIntyre. He devised the land to his sons Isaac and Jacob, and Isaac conveyed to John and claimed the benefit of the statute of limitations, having occupied the land for more than twenty years (since 1788). The statute required actions for possession to be commenced within twenty years. The action was commenced in 1815. There was a decree in favor of defendants. *Miller v. McIntyre*, §§ 737-39.

§ 731. A court of equity will so far follow the statute of limitations as to refuse equitable relief in cases in which an action of ejectment would have been barred had the complainant had a legal title. So held where a suit was brought to obtain a conveyance of lands in Kentucky, held by the defendants under a prior grant and entries older than that of the plaintiff.

The amended entry of plaintiff was made in 1784 and his patent was issued in 1794. The bill was filed in 1815. *Elmendorf v. Taylor*, §§ 740-44.

§ 732. Possession by a tenant under a purchase of a title adverse to his landlord, together with a claim under it, or other disclaimer of tenure, with the knowledge of the landlord, is so far adverse that the act of limitations will begin to run in his favor from the time of such disclaimer. A court of equity will not aid in sustaining such title without a surrender of possession until the title is perfected by lapse of time. So held where Peyton claimed under an entry made by one Francis Peyton in 1784, and a patent issued to him in 1785. Stith claimed under an entry made in 1780, and conveyed to him in 1814. Prior to that time, Stith had obtained possession as tenant under Peyton, and had been evicted in 1816 by Peyton, subsequent to which this suit was commenced, praying an injunction against further proceedings under the ejectment suit. The injunction was denied by the appellate court. *Peyton v. Stith*, §§ 745-47.

§ 733. Under the Wisconsin statute of limitations, suit to enforce a trust must be brought within ten years after the cause of action accrues. One Reed, being the lawful owner of certain lands in Wisconsin, executed a mortgage to the Cleveland Insurance Company in 1837, which became due in 1839. Previous mortgages had been foreclosed and the premises bought in by James H. Rogers, who took possession in 1833, claiming under these mortgages, first as assignee of them, and has continued in possession up to the commencement of the suit (1856). In 1842 Reed became a bankrupt, and under the sale of his property Rogers became the purchaser in 1843, and the deed was given in 1846. By section 2 of the bankrupt law the mortgage was not destroyed. This action was brought to foreclose said mortgage, charging Rogers as trustee, to which he pleaded the statute of limitations of Wisconsin. It was held a good defense. *Cleveland Insurance Company v. Reed*, §§ 748-49.

§ 734. In suits in equity involving the establishment of an implied trust in real property, the court of equity will follow the court of law in applying the statute of limitations. By the act of November 15, 1829, of Michigan, such an action, if the cause had already accrued, was barred if not brought within ten years after the passage of the act. The common ancestor of plaintiff and defendant died in 1793, in possession of certain property in Michigan, and Antoine, one of his heirs, in 1804, had the title confirmed to him by congress, and a patent was issued in 1812. He and those claiming under him have been in continued, exclusive possession of the premises since 1793, and the complainants have resided in the neighborhood, but in Canada, and the bill seeking to establish a tenancy in common between plaintiff and defendant was filed in 1837. It was held that the claim was barred. *Beaubien v. Beaubien*, §§ 750-51.

[NOTES.— See §§ 752-771.]

PIATT v. VATTIER.

(9 Peters, 405-417. 1835.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court of the district of Ohio, in a suit in equity, in which the present appellant was original plaintiff.

In June, 1827, the plaintiff purchased of John Bartle the lot of land in controversy (which is asserted to be worth from \$50,000 to \$70,000), for the consideration, as stated in the deed of conveyance, of \$3,000; and the present suit was brought in December of the same year. The bill states that when the city of Cincinnati was laid out, in 1789, the country being then a wilderness, certain lots of the city were allotted as donations to those who should make certain improvements, and that the evidence of ownership of such lots was a certificate of the proprietors, which was transferable from one to another by delivery. That lot number 1 on the plat of the city (the lot in controversy) was allotted to Samuel Blackburn, who transferred his right to one James Campbell, who transferred it to Bartle in 1790, and the latter completed the improvements required by the terms of the donation. That Bartle continued to occupy the lot under this certificate of title for several years; when, becoming embarrassed, he mortgaged the lot to one Robert Barr, of Lexington, Kentucky, of whom, the bill states, and his heirs, if deceased, the plaintiff knows nothing, for the sum of \$700; for the payment of which the

rents received by Bartle, from the tenants in possession, were to be appropriated and paid. The bill then alleges that Bartle afterwards lost the certificate in crossing the Ohio river; that Charles Vattier, one of the defendants, fraudulently purchased the mortgage of Barr, and obtained possession of the lot from the tenants, in the absence of Bartle from the country, and acquired the legal title from John C. Symmes, in whom it was vested. That Vattier afterwards sold the same to one John Smith, who is since deceased; and his heirs, if any are alive, are unknown to the plaintiff; and who had full notice of Bartle's title. That Smith afterwards sold the same to one John H. Piatt, since deceased, whose heirs are made defendants, who also had notice of Bartle's title; that Piatt in his life-time mortgaged the same to the Bank of the United States, which has obtained possession and complete title, with the like notice. The bill further charges that Bartle asserted his right to the premises to Vattier, Smith, and Piatt, at various times, but, from poverty, was unable to attempt enforcing the same in a court of equity, or elsewhere; and that the plaintiff has recently, in December, 1827, purchased Bartle's right, and obtained a conveyance thereof. The bill then states that the plaintiff had hoped that the bank would have surrendered the possession, or in case it refused so to do, that Vattier would have accounted with the plaintiff for the value thereof, taking an account of the mortgage money paid to Barr, of the improvements, rents, profits, etc. But that the bank has refused to surrender the possession, and Vattier has refused to account. And it then prays a decree against the bank to surrender the possession, and account for the rents and profits, and to execute a quiet claim; or, if the bank is protected in the possession, that Vattier shall be decreed to account, and for general relief.

In their answers, Vattier and the Bank of the United States assert themselves to be *bona fide* purchasers, for a valuable consideration, of an absolute title to the premises, without notice of Bartle's title, and they rely on the lapse of time also as a defense. The bill, as to the heirs of J. H. Piatt, was taken *pro confesso*, they not having appeared in the cause.

From the evidence in the cause it appears that Vattier and those claiming title under him have been in possession of the premises, claiming an absolute title thereto, adverse to the title of Bartle, ever since the 20th of March, 1797, the day of the date of the conveyance from Symmes to Vattier. At the hearing in the circuit court, the bill was dismissed; and the cause now stands before this court upon an appeal taken from that decision.

Various questions have been made at the argument before us, as to the nature and character of Bartle's title; and, if he had any valid title, whether the purchasers under Barr had notice of it. With these and some other questions we do not intermeddle, because, in our view of the cause, they are not necessary to a correct decision of it.

The important question is, whether the plaintiff is barred by the lapse of time; for we do not understand that the adverse possession presents, under the laws of Ohio, any objection to the transfer of Bartle's title to the plaintiff, if Bartle himself could assert it in a court of equity. This question has been argued at the bar under a double aspect: 1st, upon the ground of the statute of limitations of Ohio; and 2dly, upon the ground of an equitable bar, by mere lapse of time, independently of that statute.

§ 735. *Where limitation is pleaded by defendant, plaintiff cannot rely on the exception to it of non-residence unless he plead it.*

In regard to the statute of limitations, it is clear that the full time has

elapsed to give effect to that bar, upon the known analogy adopted by courts of equity, in regard to trusts of real estate, unless Bartle is within one of the exceptions of the statute by his non-residence and absence from the state. It is said that there is complete proof in the cause to establish such non-residence and absence. But the difficulty is that the non-residence and absence are not charged in the bill, and of course are not denied or put in issue by the answer; and, unless they are so put in issue, the court can take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. It has been supposed that a different doctrine was held by Lord Hardwicke in *Aggas v. Pickerell*, 3 Atk., 225, and *Gregor v. Molesworth*, 2 Ves., 109, and by Lord Thurlow in *Deloraine v. Browne*, 3 Bro. Ch. Rep., 633. But these cases did not proceed upon the ground that proofs were admissible to show the party, plaintiff, to be within the exception to the statute of limitations, when relied on by way of plea or answer; and the exception was not stated in the bill, or specially replied, but upon the ground that the omission in the bill to allege such exception could not be taken by way of demurrer. And even this doctrine is contrary to former decisions of the court. See *South Sea Company v. Wymondsell*, 3 P. Wms., 143, 145, and Mr. Coxe's note; *Cooper's Eq. Pl.*, 254, 255; *Smith v. Clay*, 3 Bro. Ch., 640, note. And it has since been explicitly overruled, and particularly in *Beckford v. Close*, 4 Ves., 476; *Foster v. Hodgson*, 19 Ves., 180; and *Hovenden v. Lord Annesley*, 2 Sch. & Lefr., 637, 638. And the doctrine is now clearly established, that if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill, or specially reply it; or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar. See Belt's note to the case of *Deloraine v. Browne*, 3 Bro. Ch. Rep., 640, n. 1; *Miller v. M'Intire*, 6 Pet., 61, 64. In the present case, if the merits were otherwise clear, the court might remand the cause for the purpose of amending the pleadings, and supplying this defect. But in truth the answers, though they rely generally on the lapse of time, do not specially rely on the statute of limitations as a bar; and the case may therefore well be decided upon the mere lapse of time, independently of the statute.

§ 736. *Adverse possession for thirty years is a bar in equity independently of any statute of limitations.*

And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit, independently of the statute. There has been a clear adverse possession of thirty years without the acknowledgment of any equity or trust estate in Bartle; and no circumstances are stated in the bill or shown in the evidence which overcome the decisive influence of such an adverse possession. The established doctrine, or, as Lord Redesdale phrased it, in *Hovenden v. Annesley*, 2 Sch. & Lefr., 637, 638, "the law of courts of equity," from its being a rule adopted by those courts, independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden, in *Smith v. Clay*, 3 Brown's Ch., 640, note, stated it in a very pointed manner. "A court of equity," said he, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always

discountenanced; and, therefore, from the beginning of this jurisdiction there was also a limitation of suit in this court." The same doctrine has been repeatedly recognized in the British courts, as will abundantly appear from the cases already cited, as well as from the great case of *Cholmondeley v. Clinton*, 3 Jac. & Walk., 1. See, also, *Beckford v. Wade*, 17 Ves., 86; *Barney v. Ridgard*, 1 Cox, Cas., 145; *Blannerhassett v. Day*, 1 Ball. & Beatt., 104; *Hardy v. Reeves*, 4 Ves., 479; *Harrington v. Smith*, 1 Bro. Par. Cas., 95. It has also repeatedly received the sanction of the American courts, and was largely discussed in *Kane v. Bloodgood*, 7 Johns., 93, and *Decouche v. Savetier*, 3 Johns., 190. And it has been acted on in the fullest manner by this court, especially in the case of *Prevost v. Gratz*, 6 Wheat., 481; 5 Cond. Rep., 142; *Hughes v. Edwards*, 9 Wheat., 489; 5 Cond. Rep., 648 (Conv., §§ 919-25); and *Willison v. Watkins*, 3 Pet., 43; and *Miller v. M'Intire*, 6 Pet., 61, 66.

Without, therefore, going at large into the grounds upon which this doctrine is established, though it admits of the most ample vindication and support, we are all of opinion that the lapse of time in the present case is a complete bar to the relief sought, and that the decree of the circuit court dismissing the bill ought to be affirmed, with costs. (a)

MILLER v. MCINTYRE.

(6 Peters, 61-67. 1832.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This cause was appealed from the decree of the circuit court of the United States for the district of Kentucky. The original bill was filed in May, 1808, in which the complainants stated that on the 10th of December, 1782, their ancestor, Henry Miller, made an entry of one thousand six hundred and eighty-seven acres of land, which was surveyed the 9th of April, 1804, and patented the 19th of July, 1820. That the defendants were in possession of the land under said claims; and the bill prayed that they might be compelled to disclose their titles and surrender the possession of the premises.

In June, 1815, the complainants amended their bill, and, among other things, stated that, on the 19th of May, 1780, Nicholas M'Intyre entered a thousand acres of land on the waters of the Licking, etc., and having caused the same to be surveyed, contrary to location, obtained a patent, elder in date than the complainants'. That this land was devised by Nicholas M'Intyre to his sons Isaac and Jacob; and that Isaac conveyed to John M'Intyre, who is made a defendant. Jacob M'Intyre and several others are also made defendants. In 1816 Jacob M'Intyre filed his answer, in which he admits the entry of his ancestor, as stated by the complainants, and sets forth an amendment of the said entry, made on the 14th of December, 1782. By this amendment, it seems, the entry was made to interfere with complainants' entry.

An amended answer was filed by Jacob M'Intyre in May, 1822, in which he claims the benefit of the statute of limitations from an occupancy of the land more than twenty years before suit was brought. Isaac M'Intyre seems never to have been served with process or made a defendant to the amended bill. This was deemed unnecessary; it is presumed from the fact stated in the bill that he had conveyed his interest to John M'Intyre.

(a) Affirming *Platt v. Vattier*,* 1 McL., 146.

In his answer, filed in December, 1821, John M'Intyre states that the legal title to no part of the thousand acres is vested in him; but that he holds a bond, executed by Nicholas M'Intyré, for a moiety of the said tract, and that a deed for the same had been executed to him by Isaac M'Intyre, but that it had never been recorded. He alleges that an adverse possession of more than twenty years, by himself and those claiming under him, is a bar to the plaintiff's right.

The cause was twice appealed to the supreme court from the decrees of the circuit court, and on the second appeal the decree dismissing the bill was reversed, on the ground that under the land law the survey of the complainants was made in due time, and that the patent was legally issued. And the cause was remanded to the circuit court for further proceedings, and leave was given to the parties to take testimony. 2 Wheat., 316; 11 Wheat., 441. Additional testimony was taken, chiefly with the view of proving the possession of the defendants under the M'Intyre patent. As the complainants' title was sustained by the decree of this court in 1826, the defendants do not attempt to impeach it, but rely exclusively on their possession.

In April, 1792, Kentucky adopted a constitution, and she was admitted into the Union as an independent state the ensuing session of congress.

By the first section of the schedule, which was adopted with the constitution, it is provided "that all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, shall continue as if the said government had not been established."

The statute of limitations, which was passed by the legislature of Kentucky on the 17th of December, 1796, was a literal copy of the Virginia statute, which was in force before the entries now in controversy were made. This statute therefore operated upon the rights of the parties, while the district of Kentucky formed a part of the state of Virginia, and afterwards by the adoption of the convention. It was not repealed by the statute of 1796, but re-enacted in all its parts.

In the second section of this statute it is provided "that all writs, etc., upon any title heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterwards; and that no person or persons who now hath, or have, or may hereafter have any right or title of entry, into any lands, tenements, or hereditaments, shall make any entry, but within twenty years next after such right or title accrued; and such person shall be barred from any entry afterwards." "Provided, nevertheless, that if any person or persons entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be under age, etc., or not within the commonwealth at the time such right or title accrued or coming to them, every such person and his or her heirs shall and may, notwithstanding the said twenty years are or shall be expired, bring or maintain his action, or make his entry, within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards."

§ 737. *An entry under a grant, where there is no adverse possession, is limited only by the grant, unless the contrary appear.*

By Josiah M'Dowell, David Jamison, James Sconce, Michael Hornback, and other witnesses, it is satisfactorily proved that possession was taken of the land in controversy, under the M'Intyre grant, by the defendants or persons claiming under them, in the spring of the year 1788 or 1789. The weight of testimony is in favor of the former period. It is also made to appear that

the possession was adverse to the complainants' title and co-extensive with the limits of the patent. If an entry be made under a grant, and there is no adverse possession, the entry will be limited only by the grant, unless the contrary appear.

Various reasons are assigned against the operation of the statute in this case.

§ 738. *Where new parties are brought in by amended bill, the statute of limitations runs in their favor until they are so brought in.*

It is insisted that the amended bill, filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently that the statute cannot bar, as its limitation had not then run. Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them. It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice, and where a final decree in the case could not have prejudiced their rights.

§ 738a. *In pleading the statute of limitations the facts must be specifically set forth.*

Where the statute is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him in his replication, or by an amendment of his bill, to set forth the facts specially. This has not been done in the present case; but as there are other grounds on which the decision may rest, this objection will not be further noticed. The adverse possession was taken in this case in the spring of 1788 or 1789. In the spring of 1796, the ancestor of the complainants died, and his heirs brought suit against the present defendants in June, 1815. From some of the depositions it appears that a part of the complainants were not of full age in April, 1804; but how soon afterwards this disability ceased is not proved. Unless the disability be shown to exist, so as to protect the rights of the complainants, the effect of the statute, on that ground, cannot be avoided.

At least twenty-six years elapsed after the adverse possession was taken by the defendants, before suit was brought against them by the complainants, and nineteen years from the decease of their ancestor. As the statute of Virginia was made the statute of Kentucky by adoption, in 1792, if the adverse possession which had been held for several years commenced at that time, or when the constitution formed by Kentucky was sanctioned by congress, it would give a possession of about twenty-two years; eighteen or nineteen of which were subsequent to the decease of the complainants' ancestor.

Under this state of facts, it is clear that the statute constitutes a bar, unless it shall be shown not to operate against the complainants' title. As the limitation of the statute, both as to the twenty years' adverse possession, and the ten years' subsequent to the decease of the complainants' ancestor, had run since 1793, before suit was commenced, it is unnecessary to inquire what effect the Virginia statute had upon the rights of the parties before it was adopted by Kentucky.

§ 739. *The statute of limitations bars in equity and law, where the titles are adverse in their origin, and one equitable and the other legal.*

It is earnestly contended that the statute does not run against an equitable title, and consequently that it cannot operate as a bar in this case, as the legal title was not vested in the complainants until the emanation of their patent in 1820.

On this ground the counsel seem chiefly to rely, and several authorities are referred to in support of it. In 4 Bibb, 372, the court say, it is a general rule that a court of equity will not relieve against a possession with right, after the lapse of twenty years; but they do not determine whether this rule applies where the conflicting titles are adverse in their origin. 2 Mar., 570; 1 Mar., 53, 506; 3 Mar., 146, are cited to show that the statute does not run, except against a grant. This is undoubtedly the case at law, but a different rule has been established in equity. The courts in Kentucky and elsewhere, by analogy, apply the statute in chancery to bar an equitable right, where at law it would have operated against a grant.

This principle has been so well established, and so generally sanctioned by courts of equity, that it can hardly be necessary to enter into an investigation of it. At first the rule was controverted, and afterwards frequently evaded, on the ground of implied trusts; but the modern decisions have uniformly sustained the principle. This doctrine is ably discussed in the case of the Marquis of Cholmondely v. Lord Clinton, reported in 2 Jac. & Walk., 1. In that case it is said that "at all times courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time."

At law, the statute operates where the conflicting titles are adverse in their origin, and no reason is perceived against giving the same effect to the statute in equity. In the case of *Elmendorf v. Taylor*, 10 Wheat., 168 (§§ 740-44, *infra*), the chief justice, in giving the opinion of the court, says, "from the earliest ages courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims; especially where the legal estate has been transferred to purchasers without notice." That "although the statute of limitations do not, either in England or in these states, extend to suits in chancery, yet the courts in both countries have acknowledged their obligations." In referring to the above case of *Cholmondely v. Clinton* he says, "it was considered and treated by the court as a case of the highest importance; and the opinion was unequivocally expressed, that, both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate for a period of twenty years (supposing it the case of one who must within the period have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief by analogy to the statute of limitations, if during all that period the possession has been held under a claim unequivocally adverse." This case was appealed to the house of lords, where the lord chancellor considered that twenty years constituted a bar; the possession being adverse. And Lord Redesdale declared that "they had always considered the provision in the statute of James," which is similar to the Kentucky statute under consideration, and "which applied to rights and titles of entry, in which the period of limitation was twenty years, as that by which they were bound; and it was that upon which they had constantly acted."

In the conclusion of the opinion the chief justice says, "in all cases where an adverse possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity."

From the above authorities, it appears the rule is well settled, both in England and in this country, that effect will be given to the statute of limitation, in equity the same as at law. And as in this case there could be no doubt, if

the complainants' ancestor had held by grant at the time the adverse possession was taken, that the statute would have barred the right of entry, the same effect must be given to it in equity.

The decree of the circuit court, dismissing the bill, is affirmed. (a)

ELMENDORF v. TAYLOR.

(10 Wheaton, 152-177. 1825.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This suit was brought by the appellant, Elmendorf, in the court for the seventh circuit and district of Kentucky, to obtain a conveyance of lands held by the defendants under a prior grant, and under entries which are also older than the entry of the plaintiff. As the defendants do not adduce their entries, and rely entirely on their patent, the case depends on the validity of the plaintiff's entry. That was made in April, 1784, and was afterwards, in July of the same year, explained, or amended, so as to read as follows: "Walker Daniel enters eight thousand acres, beginning at the most southwestwardly corner of Duncan Rose's survey of eight thousand acres between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with James Kemp's line, north two degrees west, nine hundred and sixty-four poles to a survey of John Lewis for twenty-two thousand acres; thence with Lewis' line, and from the beginning south seven degrees west, till a line parallel with the first line will include the quantity."

As this entry begins at "the most southwestwardly corner of Duncan Rose's survey of eight thousand acres between Floyd's Fork and Bull Skin," the first inquiry is, whether this survey was at the time an object of sufficient notoriety to give validity to an entry calling for one of its corners as a beginning. It is not pretended that the survey itself had acquired this notoriety; but the plaintiff contends that it had become a matter of record, and that subsequent purchasers were, on that account, bound to know its position, in like manner as they are bound to know the position of entries. The land law prescribes that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time of their being made. They are to be returned to the land office in twelve months from their date, during which time the surveyor is forbidden to give a copy to any person other than the owner.

It is contended by the defendants that this prohibition to give a copy of the plot and certificate of survey excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book which is denominated a book of record, it does not become, in fact, a record until it shall partake of that characteristic quality of a record, on which the obligation to notice it is founded, being accessible to all the world. Were even an inspection of the book demandable as matter of right, which the defendants deny, that inspection would, they say, from the nature of the thing, be of no avail, unless a copy was also attainable. They insist, therefore, that the notoriety of these surveys is not to be implied from the fact that the three months had expired during which they were directed by law to be recorded.

(a) Affirming *Miller v. McIntire*, * 1 McL., 85.

The plaintiff contends that the book of surveys has every characteristic of a record except that the surveyor is restrained from granting copies until the time limited by law for the return of surveys to the land office shall have expired, and denies that the notoriety attached to a record is dependent entirely on the right to demand a copy of it. He maintains the right to inspect it, and insists that this right has been considered by the legislature as giving sufficient notice to all persons interested in the property to enter a *caveat* against the issuing of a patent, from which he implies that it is intended as a record to give notice, although a copy of it cannot be obtained. Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky.

§ 740. *The construction given by the courts of a state to the laws of the state is always adopted by the courts of the United States when not in conflict with the constitution and laws of the United States.*

This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

§ 741. *Under the Kentucky land law a survey is presumed to be recorded within three months after its date; an entry dependent on it is entitled to all the notoriety of the survey.*

The defendants contend that conflicting opinions have been given in the state, and that the question is still open; while the plaintiff insists that the real question, that is, the notoriety of a survey after being made three months, has never been determined in the negative.

The first case of which we have any knowledge is *Sinclair v. Singleton*, Hughes, 92. The decision of the court was in favor of the validity of an entry which calls for the lines of a survey. The court is not in possession of the book in which the case is reported, but, judging from the references made to it in subsequent cases the entry must have been made within twelve, and probably within three, months of the date of the survey.

The next case in which the question was directly made is *Key v. Matson*, Hardin, 70, decided in the fall term of 1806. The survey had not been made three months at the date of the entry, and the court determined that it was not an object of notoriety. A rehearing was moved for, and, according to

the course of the court of appeals of Kentucky, errors were assigned in the original decree. The first was, that "the court has decided that an entry dependent on a survey not made three months is void; whereas, according to law and former decisions, such an entry ought to have been valid."

The court adhered to its first decision, and used expressions which, though applied to a case in which the entry was made before the expiration of three months after the survey on which it depended, yet indicated the opinion that an entry made after the expiration of three months from the date of the survey would be equally invalid.

Moore v. Whitley, Hardin, 89, and Respass v. Arnold, Hardin, 115, decided in the spring of 1807, were on the authority of Key v. Matson, and were also cases in which the entries were made a few weeks after the surveys. The case of Cartright v. Collier, Hardin, 179, decided in the spring of 1808, was one in which the entry was made only fifteen days after the survey. In Ward v. Lee, 1 Bibb, 27, decided in 1808, the entry called for a survey which had been made twenty-three days, of the return of which, to the office, there was no proof. The judge adds, "if it had been returned and recorded, yet no person was entitled to a copy." This last observation is indicative of the opinion that a survey, though recorded, would not become an object of notoriety until a copy of it was demandable; but it was made in a case in which that point did not occur. The case of Cleland's Heirs v. Gray, 1 Bibb, 38, decided at the same time, is of the same character. The survey was made sixteen days before the entry which called to adjoin it. The judge says: "It is clear that no description in this certificate of Evan Shelby's survey can aid Weeden's entry, because it does not appear that the certificate was even made out or deposited in the surveyor's office at the date of Weeden's entry. But if it had been recorded, yet it was inaccessible to holders of warrants. They were not entitled to a copy until twelve months after the making of the survey; nor was the surveyor himself bound to record it in less than three months after the survey was made."

In the case of Galloway v. Neale *et al.*, 1 Bibb, 140, the judge who delivered the opinion of the court states the law thus: "If the holder of a warrant adopts a survey previously made upon another warrant as the basis of a location, he must prove the notoriety of the survey at that period, otherwise his location cannot be supported. If he has adopted such survey at a period earlier than that at which the law has opened the record thereof for copies, he must prove its notoriety by evidence *aliunde*." This plain declaration of the opinion of the court on this point was, however, made in a case in which it did not arise. The survey had preceded the entry which called for it more than twelve months.

The cases of Davis v. Bryan, 2 Bibb, 113, and Davis v. Davis, 2 Bibb, 137, decided in the spring of 1810, were each of them cases in which the surveys preceded the entries calling for them less than three months. It is, then, true that from 1806 to 1810, inclusive, the prevailing opinion of the court of Kentucky was, that an entry could derive no aid from the description contained in the plat and certificate of a survey for which it called, until that survey had been made twelve months; but it is also true, that this opinion had been advanced only in cases in which the point did not occur.

The first case in which the point actually occurred was Carson v. Hanway, 3 Bibb, 160. The entry was made on the 9th of February, 1784, and called for a survey made on the 15th of February, 1783. The entry was supported on

the principle that the plat and certificate of survey constituted a part of it. In delivering the opinion of the court, the judge said, "when the survey has been so long made that the law requires it to be of record, it will be presumed to be so, and a call for its lines in an entry will render it a part of the description of such entry."

At the preceding term before the same judges, the case of *Bush v. Jameson*, 3 Bibb, 118, was argued, and the court determined that an entry could not be aided by the description contained in a survey which had been made only seven days prior to the entry which called to adjoin it. In giving its opinion the court says: "How far a subsequent adventurer would have been bound by a description given in the survey of its beginning corner, if the survey had been of record, is not material to inquire; for there is no proof that the survey was, in fact, of record; and as the law did not require that it should have been recorded at the date of the entry, a presumption that it was cannot be indulged according to any rule of probability or on any principle recognized in former adjudications of this court."

These cases, decided so near each other by the same judges, show clearly by the terms in which they are expressed, that the distinction between a survey, neither recorded in fact nor in presumption of law, was in the mind of the court; and that its former adjudications were considered.

Reed's Heirs v. Denwiddie, 3 Marsh., 195, was decided in the year 1820. In that case an entry called for a survey which had been made six months, and the court determined that the person claiming under this entry might avail himself of the notoriety contained in the certificate of survey, "which, from its date, must have been of record."

Jackman's Heirs v. Walker's Heirs, 3 Litt., 100, is the last case which has been cited. It was decided in 1823. The surveys were made about ten months before the entry which called to adjoin them, and the court allowed to the entry all the aid which could be derived from the description contained in the next certificate of survey; because, "from the length of time they had been made before the date of the entry in question, the law required them to be of record, and, of course, they must be presumed to be so."

From the year 1813, then, to the present time, the courts of Kentucky have uniformly decided that a survey must be presumed to be recorded at the expiration of three months from its date; and that an entry dependent on it is entitled to all the notoriety which is possessed by the survey. We must consider the construction as settled finally in the courts of the state, and that this court ought to adopt the same rule should we even doubt its correctness. We think, then, that the entry under which the plaintiff claims is aided by the notoriety of the surveys which it calls to adjoin, if those surveys have been made three months anterior to its date.

This depends on the question whether it is to date from April or July, 1784. The defendants insist that the amendment or explanation of the 1st of July does not change the ground originally occupied, and is, therefore, not to be considered as having any influence on the date of the entry, or as connecting it with the surveys mentioned in the amendment or explanation. We cannot think so. This amendment would be seen by subsequent locators, and would give them as full notice that the entry adjoined the surveys of Duncan Rose, James Kemp and John Lewis, as they would have received had the original entry been made on that day. Were it then to be conceded that the original entry, calling for Greenville Smith's line, instead of James Kemp's,

would have been construed to cover the same ground which it now covers, still we perceive no substantial reason for refusing to the change made in its terms any advantage belonging to the date of that change.

We think, then, for the purpose of the present inquiry, the entry is to be considered as if made on the 1st of July, 1784, and is entitled to all the notoriety of the surveys for which it calls. This being established, we do not understand that any controversy remains on the question of notoriety. Some of the objects called for in the surveys are so well known as to fix incontrovertibly the beginning of the entry made by Walker Daniel; and its validity is not questioned on any other ground. The validity of the plaintiff's entry being established, it remains to consider the other objections which are made to a decree in his favor.

§ 742. *Rules as to necessary parties in equity.*

2. It is contended that he is a tenant in common with others, and ought not to be permitted to sue in equity, without making his co-tenants parties to the suit.

This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case the persons who are alleged to be tenants in common with the plaintiffs, appear to be entitled to a fourth part, not of the whole tract, but of a specially described portion of it, which may or may not interfere with the part occupied by the defendants. Neither the bill nor answers allege such an interference, and the court ought not, without such allegation to presume it. Had the decree of the circuit court been in favor of the plaintiff, and had this objection to it been deemed sufficient to induce this court to reverse it, and send back the case for the examination of this fact, it could never have justified a dismissal of the bill without allowing the plaintiff an opportunity of showing that he was the sole owner of the lands in dispute. In addition to these observations, it may be proper to say that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States is not applicable to all. In the exercise of its discretion the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do.

§ 743. *A court of equity will so far follow the statute of limitations as to refuse equitable relief in cases in which an ejectment would have been barred had the party held a legal title.*

3. The third point in the defense is the length of time which has elapsed since the plaintiff's equitable title accrued. His patent was issued on the 11th

of February, 1794, and those of the defendants are of prior date. His bill was filed on the 28th of December, 1815. Several of the defendants in their answers claim the benefit of the length of time.

From the earliest ages, courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims, especially where the legal estate has been transferred to purchasers without notice. Although the statutes of limitations do not, either in England or in these states, extend to suits in chancery, yet the courts in both countries have acknowledged their obligation. Their application, we believe, has never been controverted; and in the recent case of *Thomas v. Harvie's Heirs*, 10 Wheat., 146, decided at this term, it was expressly recognized. But the statute of limitations, which bars an ejectment after the lapse of twenty years, constitutes no bar to a writ of right, even where the tenant counts on his own seizin, until thirty years shall have elapsed. Whether a court of equity considers an equitable claim to land as barred when the right of entry is lost, or will sustain a bill as long as the mere right may be asserted, is a question of some difficulty and of great importance. The analogy of a bill in equity to actions founded on a right of entry seems to derive some title to consideration, from the circumstance that the plaintiff does not sustain his claim on his own seizin, or that of his ancestor, but on an equity not necessarily accompanied by seizin, whereas seizin is an indispensable ingredient in a writ of right. But the case must depend upon precedent, and if the one rule or the other has been positively adopted, it ought to be respected.

In the case of *Jenner v. Tracy*, 3 P. Wms., 287, in a note, the defendant demurred to a bill to redeem mortgaged premises, of which the defendant had been in possession more than twenty years, and the demurrer was sustained; the court observing that "as twenty years would bar an entry or ejectment, there was the same reason for allowing it to bar a redemption." It is added that "the same rule was agreed in the case of *Belch v. Harvey*, by the Lord Talbot." In 3 Atk., 225, the court expressed an opinion unfavorable to a demurrer in such a case, because the plaintiff ought to be at liberty, in his replication, to show that he is within the exceptions of the statute; but supported the bar when pleaded. The same principle is recognized in 3 Atk., 313. The rule appears to have been laid down in 1 Ch. Cas., and to have been observed ever since.

In 3 Johns. Ch., Chancellor Kent said: "It is a well settled rule that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations."

These decisions were made on bills to redeem mortgaged premises; but as no reason can be assigned why an equity of redemption should be barred in a shorter time than any other equity, they appear to us to apply with equal force to all bills asserting equitable titles. We have seen no *dictum* asserting that the rule is not applicable to other equitable rights, and we should not feel justified in drawing a distinction which has never heretofore been drawn. But we think the rule has been applied to equitable rights generally.

In the second volume of *Eq. Cas. Abr.*, title "Length of Time," it is said generally "that possession for more than twenty years, under a legal title, shall never be disturbed in equity." The case of *Cook v. Arnham*, 3 P. Wms., 283, was a bill brought to supply the want of a surrender of copyhold estate to the use of the will; and it was objected that the application to the court

had been unreasonably delayed. The lord chancellor said that "the length of time was not above fourteen years, which, as it would not bar an ejectment, so neither could it bar a bill in equity."

The case of *Bond v. Hopkins*, 1 Sch. and Lef., 413, was a suit brought by a person claiming to be the heir, to set aside a will alleged to be obtained by fraud, to obtain possession of title papers and to remove impediments out of the way in a trial at law. Length of possession was set up as a bar to the relief prayed for in the bill; and the question, which was discussed at the bar by very eminent counsel, was profoundly and deliberately considered by Lord Redesdale. The testator died in November, 1754, and the bill was filed in June, 1792, so that thirty-eight years had elapsed between the death of the testator and the filing of the bill. As this time was not sufficient to bar a writ of right, no question could have arisen respecting the act of limitations, had the rule of granting relief in equity depended on the ability of the plaintiff to maintain a writ of right. But the rule was clearly understood, both at the bar and by the court, to be that the equitable rule respecting length of time had reference to twenty years, the time during which the right of entry was preserved, not to the time limited for maintaining a writ of right. In the very elaborate and very able opinion given by the chancellor, in this case, in which he investigates thoroughly the principles which govern a court of equity in its decisions on the statute of limitations, it is not insinuated that it acts in any case from analogy to a writ of right, but is assumed as an acknowledged and settled principle that it acts from analogy to a writ of ejectment. In this case a suit had been instituted by John Bond, the grandfather of the plaintiff, as early as 1755, and a decree pronounced in 1770. The full benefit of this decree was not obtained, and John Bond took forcible possession of a part of the property, of which he was dispossessed by order of the court on a bill for that purpose brought by the defendant. The said John Bond died in prison, in 1774, having first devised the property in dispute to his son Thomas, then an infant, for life, with remainder to his first and other sons, in strict settlement. Soon after his death, an ejectment was brought by the defendant to recover part of the property in possession of Bond; and, in 1776, a bill was filed by Thomas Bond, then a minor, to enjoin the defendants from proceeding in their ejectment, and to have the will delivered up. Various orders were taken; and in June, 1792, an original bill, in the nature of a bill of revivor, was filed by Thomas Bond and his eldest son, Henry. In discussing this case, so far as respected length of time, no doubt was entertained that the plaintiffs would have been barred of all relief in equity by a quiet acquiescence in the possession of the defendants for twenty years. It was a strong case of fraud, but an acquiescence of twenty years would have closed the court of equity against the plaintiffs. This was not questioned; but it was insisted that the pendency of suits, from the year 1755, when John Bond, the son and heir of the testator, returned from America, had preserved the equity of the plaintiffs, unaffected by the lapse of time; and of this opinion was the court.

The case of *Hovenden v. Lord Annesly*, 2 Sch. & Lef., 607, was a bill filed in May, 1794, to set aside a conveyance made in July, 1726, alleged to have been fraudulently obtained. There were some circumstances on which the plaintiff relied, as relieving his case from the laches justly imputable to him for permitting such a length of time to elapse; but they need not be noticed, because they were deemed insufficient by the chancellor, and the bill was dismissed. In discussing this point, Lord Redesdale reviewed the cases which

had been determined, and said, "that it had been a fundamental law of state policy, in all countries and at all times, that there should be some limitation of time beyond which the question of title should not be agitated. In this country, the limitation has been fixed (except in writs of right and writs depending on questions of mere title) at twenty years." "But it is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered." After reasoning for some time on this point, and citing several cases to show "that wherever the legislature has limited a period for law proceedings equity will, in analogous cases, consider the equitable rights as bound by the same limitation," he says, "a court of equity is not to impeach a transaction on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down that every right of action in equity that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years."

This question was fully discussed, and solemnly, and, we think, finally decided, in the case of *The Marquis Cholmondeley v. Lord Clinton*, reported in the second volume of *Jacobs and Walker*, 1. In that case, the title accrued in December, 1791, and the bill was filed in June, 1812. Other points were made; but the great question on which the cause depended was the length of time which had been permitted to elapse, and this question, after being argued with great labor and talent at the bar, was decided by the court, upon a full review of all the cases which are to be found in the books. It was considered, and was treated by the court, as one of the highest importance, and the opinion was unequivocally expressed that, "both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate for a period of twenty years (supposing it the case of one who must, within that period, have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if during all that period the possession has been held under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor." Upon this ground alone the bill was dismissed. The plaintiff appealed to the house of lords, and the decree was affirmed.

The lord chancellor, in delivering his opinion in the house of lords, took a distinction, as to length of time, between trusts, "some being expressed, and some implied." "In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do anything adverse to it; a tenant, also, had the duty to preserve the interests of his landlord; and many acts, therefore, of a trustee and a tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them."

In a case of actual adverse possession, however, as was that before the house, his lordship considered twenty years as constituting a bar. Lord Redesdale was of the same opinion, and, in the course of his address, remarked that "it had been argued that the Marquis Cholmondeley might, at law, have had a writ of right. That was a writ to which particular privileges were allowed, but courts of equity had never regarded that writ, or writs of formedon, or

others of the same nature. They had always considered the provision in the statute of James, which applied to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound, and it was that upon which they had constantly acted."

§ 744. *Where a party is not a strict trustee, but holds under a title adverse to the plaintiff, such party is entitled to the bar of twenty years at law and in equity.*

This is not an express trust. The defendants are not, to use the language of the lord chancellor in the case last cited, "strict trustees, whose duty it is to take care of the interests of *cestui que trusts*, and who are not permitted to do anything adverse to it." They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred did the plaintiff possess a legal title.

This point has been decided in the same manner by the courts of Kentucky. The counsel for the plaintiff insist that those decisions are founded on the peculiar opinions entertained by that court respecting writs of right. We do not think so. Their doctrine on that subject is, indeed, used as an auxiliary argument; but it is merely auxiliary to an opinion formed without its aid.

The decree of the circuit court is to be reversed, and the cause remanded to that court, with instructions that the entry under which the plaintiff claims is valid; but that the adversary possession of the defendants, respectively, constitutes a complete bar to the plaintiff's bill, wherever it would constitute a bar to an ejectment did the plaintiff possess the legal title.

PEYTON v. STITH.

(5 Peters, 485-494. 1831.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—The subject of this controversy is a tract of land situated on Kingston Fork of Licking Creek, and Buck Lick Creek, a branch thereof. Stith, the complainant below, claims title under an entry made by Jenkins Phillips, on the 18th of May, 1780, in the following words: "Jenkins Phillips enters one thousand acres on the southwest side of Licking Creek, on a branch called Buck Lick Creek, on the lower side of said creek, beginning at the mouth of the branch and running up the branch for quantity, including three cabins."

A survey was made on this entry on the 20th November, 1795, taking Buck Lick Branch, reduced to a straight line, as its base, and laying off the quantity in a rectangle on the northwest side of Buck Lick. A patent was granted to Phillips on this survey on the 26th of June, 1796, who, on the 8th of February, 1814, conveyed to Stith six hundred and sixty-six acres thereof, including the land in controversy. Stith was then in possession of the land under the circumstances which will be hereafter referred to.

The appellant claimed, under an entry made by Francis Peyton for one thousand acres, a survey on the 9th of October, 1784, and a patent on the 24th of December, 1785; so that the case presented was of Stith claiming the prior equity against the elder grant, which, it is admitted, carried the legal title. No question arose on the validity of Peyton's entry, as his elder grant

was conclusive, unless an equity arose in Phillips, by his prior entry; but the validity of this entry was questioned by the appellant on several grounds, involving no general principles which are necessary to be settled by the court, but only those arising on matters of fact and detail which have no bearing on the merits of the case.

We entertain no doubt of the validity of the entry; its calls are sufficiently descriptive, according to the well-established principles of this and the courts of Kentucky, and give Phillips the prior equity to the land, which has been duly followed up and consummated by a grant within the time required by the laws of Virginia and Kentucky, without any laches which can impair it.

This entry was much contested, both parties objecting to the survey as executed in November, 1795. The circuit court were of opinion that the entry ought to be so surveyed as to make the line following the general course of Buck Lick, the center instead of the base line of the survey, and to lay off an equal quantity on each side, in a rectangular form, according to the rule established by the court of appeals in Kentucky, in *Harding*, 59, 367; 1 *Bibb*, 79, 107; 2 *Bibb*, 122; 4 *Bibb*, 153, 383, and in this court, in 2 *Wheat.*, 323, with which we fully concur.

As the survey of 1795, and the one directed by the circuit court, both embrace all the land in dispute about which any contest arises, it is unnecessary to notice them minutely, as in our opinion the entry and survey of Phillips gave him an equitable title which attached to the land, elder than *Peyton's*, and would entitle the complainant to a decree, unless the case discloses such facts as, independent of the original titles, present a bar to the relief he asks.

It is alleged by the appellant that one *Jeremiah Wilson*, in the year 1792 or 1793, came to the land in question, within the lines of *Peyton's* patent, and resided there until the month of March, 1795, when he took a lease for five years from the agent of *Peyton*, and continued to reside there for some years; that from *Wilson's* first settlement there was a continued uninterrupted possession of the land, by tenants and persons holding under *Peyton* and his heirs, till *Stith*, the complainant, took possession as tenant of *Peyton's* heirs, under an agreement with one *Mitchell*, who acted as their agent under a verbal authority from some of them; and that he remained there until December, 1813, when possession was demanded of him on behalf of the appellants, which he refused to deliver up. Whereupon, a warrant of forcible entry and detainer was, on their complaint, issued by a justice of the peace, on the 27th of January, 1814, and an inquisition taken on the 1st of February, finding *Stith* guilty, but that on a traverse of the inquisition, in April following, he was acquitted. An ejectment was then brought against him by the appellants, and judgment rendered for the plaintiffs, at the November term of the circuit court, 1816, when the present bill was filed, praying for an injunction against further proceedings on the ejectment, and a conveyance of the legal title to the land recovered. An injunction was ordered. The respondents, in their answer, allege that the complainant was put into possession as the tenant of their ancestor, by his agent, but afterwards took possession under *Jenkins Phillips*, with the fraudulent purpose of cheating and defrauding him.

To this answer a special replication was put in by the complainant, averring that he did not enter as tenant aforesaid, and sets up the proceedings of forcible entry and detainer and his acquittal, and relies on them for further replication in bar of the allegation. An amended answer was by leave of the court and on terms afterward filed, averring that the complainant rented the

land and entered thereon as the tenant of Peyton, and continued to reside as such tenant until he purchased from Phillips; and that he ought not to be permitted to set up any adverse title, until he would surrender possession to the respondents. They rely on their uninterrupted possession, plead the act of limitations of 1809 as a bar to the relief sought by the bill, and aver that the bill ought not to be sustained, as the complainant is colluding with another, contrary to every principle of morality.

To this amended answer the complainant demurred: 1. Because the act of 1809 was a violation of the compact between the states of Virginia and Kentucky. 2. If the law is not void, the respondents cannot avail themselves of it, as they were not, and the complainant was, settled on and actually in possession of the premises in question when the bill was filed, holding and claiming under the title set forth in his bill. 3. That the respondents had not the actual and continued possession for the number of years required by the law, next preceding the filing of the bill, but were ousted and possession held by complainant. 4. That the complainant and respondent were in actual litigation, in the action of ejectment of their relative rights under their titles, on the 1st of January, 1816, and long before, and until the filing of this bill.

On these pleadings, and a great mass of depositions taken in the cause, the circuit court rendered a decree for the complainant. On a careful examination of the whole record, we are abundantly satisfied that the appellants have fully established the fact of the tenancy of Stith at the time he entered on the land. It is positively sworn to by three witnesses, and contradicted by none. His demurrer to the amended answer admits it most distinctly, as well as the continuance of the tenancy down to his purchase from Phillips. If this part of the case rested only on the evidence in the cause, unsupported by the demurrer, we should require nothing more to satisfy our minds; but connected with the solemn admission on record, it presents a case cleared of all possible doubt.

The agreement by which he rented the land was for one year, at a rent of \$20, payable in November, 1811. By continuing in possession he remained a tenant from year to year, his possession being in law the possession of Peyton or his heirs, with all the relations of landlord and tenant subsisting between them in full force.

It appears that Stith refused to surrender up the premises on a demand made by the agent of Peyton, in December, 1813; in consequence of which he instituted a proceeding before a justice of the peace, in pursuance to the law of Kentucky relating to forcible entry and detainer. 4 Littell's Laws, 182. This law contains provisions similar to the statutes of Richard III. adopted or substantially re-enacted in all the states; and authorizes the same proceedings against tenants who, after the expiration of their term, refuse to restore the possession to the landlord.

On this proceeding an inquisition was found against Stith on the 1st of February, 1814; but he was acquitted on a traverse tried in April following. The record does not state explicitly the object of this process, whether it was to proceed for the forcible entry or only for the detainer; the warrant is in the form directed by the second section of the law, embracing both, which are charged as having been committed on the 22d of December, 1813. This, connected with the proof in the cause, and the admission of the tenancy of Stith, in his demurrer to the amended answer to the bill, leaves no doubt that the proceeding was against him as a tenant holding over, and coming within the provisions of the sixteenth section of the law. This is the more apparent

when there appears no evidence that, prior to the purchase from Phillips, eight days after the finding of the inquisition, Stith had done any act disavowing his tenancy, except the refusal to surrender possession. Thus considered, the case is an unsuccessful attempt by a landlord to recover possession from an obstinate tenant, whose refusal could not destroy the tenure by which he remained on the premises, or impair any of the relations which the law established between them. The effect of the acquittal extended no further than to deprive the landlord of the benefits expected from this process, and turn him round to the ejectment which he afterwards brought. The judgment on the acquittal concluded nothing but the facts necessary to sustain the prosecution, and which could be legally in issue. If a case is made out within the sixteenth section of the law, it declares "the tenant shall be adjudged guilty of a forcible detainer;" and this was the matter to be inquired into. Title could not be set up as a defense; Stith could not avail himself of the purchase from Phillips; a judgment for either party left their rights of property wholly unaffected, except as to the mere possession; and the acquittal could only disaffirm the forcible detainer, as nothing else was in issue. It was conclusive on the landlord as to that, but in all other respects the rights and relations of the parties remained as before the institution of the process. The tenancy was not determined; Peyton was not ousted, and the possession did not become less the possession of the landlord by any legal consequences resulting from the acquittal, unless the relative situation of the parties as landlord and tenant became changed by the purchase from Phillips, after the inquisition and before the traverse.

§ 745. *Effect of the purchase by a tenant of an adverse title.*

In the case of *Willison v. Watkins*, 3 Pet., 44, decided at the last term, this court considered and declared the law to be settled, that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term; that his possession became so far adverse that the act of limitations could begin to run in his favor from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit, at any time before the period prescribed by the statute had expired, by the mere force of the tenure, without any other evidence than the proof of the tenancy; but that the tenant could in no case contest the right of his landlord to possession, or defend himself by any claim or title adverse to him, during the time which the statute has to run.

If the landlord suffers it to run out without making an entry or bringing a suit, each party may stand upon his right; but until then the possession of the tenant is the possession of the landlord.

§ 746. *A tenant who has purchased an adverse title cannot assert such title and ask the aid of a court of equity in sustaining it, without surrendering possession, until his title is perfected by the lapse of time.*

Tested by these principles, the purchase from Phillips in 1814 can have no effects on the merits of this case. Though the possession of Stith became from that time adverse for these specified purposes, it remained fiduciary for all others. He could not assert an adversary title without surrendering possession. The law recognizes him as having no rights of property in the lands, unless such as grow out of his tenure; his title must remain dormant, while he retains possession for a less term than prescribed by law; it may become active whenever he abandons the possession or it is protected by the limita-

tion. The same principles which would prevent a tenant from contesting his landlord's title in a court of law would apply with greater force in a court of equity, to which he would apply for the quieting of a tortious possession and a conveyance of the legal title. If the relations subsisting between them could deprive him of defense at law, a court of chancery could not afford him relief as a plaintiff during their continuance. Before he can be heard in either in assertion of his title, he must be out of possession unless it has become legalized by time; and even then there may be cases where an equitable title had been purchased under such circumstances as would justify a court of equity in withholding their aid to a *mala fide* purchaser.

It is not necessary to decide whether this is such an one, since we are very clear that the present complainant can on no principle of law or equity have any claims on the interference of this court to prevent the respondents from obtaining, by their judgment in ejectment, a restoration of the demised premises. This is his right by the terms and effect of the tenure, on the faith of which the one party gave and the other received possession. As the possession of the plaintiff has been continuous, from the first entry as a tenant, his remaining after the purchase from Phillips is neither an ouster nor disseizin of Peyton, so as to put him to the assertion of his right under his patent. The possession of Stith must be interrupted and its continuity broken before he can be permitted to sustain any proceeding founded on the equitable title thus acquired. For admitting his possession to be so far adverse that the limitation began to run from February, 1814, the right of the plaintiffs in the ejectment to possession on the termination of the tenancy remains unimpaired, and is as much to be respected in a court of equity as of law, it being an attribute and incident of the tenancy which attaches to it, notwithstanding any act of the tenant short of a voluntary restoration of the premises or undisturbed occupation for seven years, by the law of 1809.

This view of the case is fatal to the proceeding in equity commenced while the complainant is residing on the land demised, and before the expiration of three years from the commencement of his disclaimer, or adversary holding with the knowledge of Peyton.

§ 747. *Continued possession for twenty years of a part of the land by or for one who holds the legal title perfects the title to the whole body of land included within the boundaries of the grant or deed.*

There is another objection to the relief sought for by the complainant, which seems to the court to be conclusive. On an attentive examination of the evidence returned with the record, we are of opinion that a continued and uninterrupted possession for twenty years in Peyton and his heirs, prior to the filing of the bill, has been fully proved. There appears to have been no point of time since the first entry of Wilson in 1792 or 1793, within which the premises have been unoccupied by him; as Peyton held the legal title the possession under him extends to the bounds of his survey, and is as complete to the whole as if the actual occupation was co-extensive with his grant.

It is proved without contradiction that the land was in the woods, wholly unimproved, when Wilson first entered; and there is no evidence to show that when he leased from Peyton, in March, 1795, any other person was upon the ground. His patent gave him legal seizin and constructive possession of all the land within his survey. *Barr v. Gratz*, 4 Wheat., 222; *Green v. Lister*, 8 Cranch, 250.

Though Wilson's first entry was without claim of title in himself or any

other, his attornment to the title of Peyton in 1795 will make his possession relate back to his first entry, and, connected with the legal possession, give to Peyton all the benefits of actual occupation from that time. But even confining him to the period of actual occupation under his title, it appears that twenty-one years and eight months had elapsed before the filing of the complainant's bill. This would afford at law a complete bar to an ejectment under the title of Phillips, and courts of equity adopt the same rule by analogy. *Hughes v. Edwards*, 9 Wheat., 489 (Conv., §§ 919-25); *Elmendorf v. Taylor*, 10 Wheat., 152 (§§ 740-44, *supra*).

The continuity of the possession does not appear to have been broken; there is evidence of an attempt made by Phillips and Riley, his son-in-law, to tamper and collude with the tenants to attorn with him; and some of the witnesses speak of declarations of some of the tenants, of their having some sort of connection with his title, but in what way does not satisfactorily appear. There is no evidence of any agreement between him and any of them; on the contrary there is clear evidence of the tenancy of all the occupants under Peyton, from the entry of Wilson down to the lease to Stith; and no fact is disclosed in any of the depositions which would in law amount to a disclaimer of the tenure by any of the tenants, an attornment to Phillips, or possession adverse to the landlord. There seems nothing which would make out such an adverse possession in Phillips as would interrupt that of Peyton, and though there are some circumstances in evidence of an equivocal character, they cannot amount to a disseizin or ouster, or dissolve the relations resulting from the original acknowledged relations between him and his tenants, which continued until the filing of the bill. Such continued possession for twenty years, under the legal title of Peyton, constitutes a complete bar to all the relief prayed for in the bill. It is, therefore, the opinion of the court that the decree of the circuit court be reversed, and that the cause be remanded, with instructions to dismiss the bill of the complainants, with costs, but without prejudice to the right of the complainant, accruing or vested in him by any deed or contract with Lockett, or any other person, in relation to any part of the land contained in either of the surveys of Peyton.

CLEVELAND INSURANCE COMPANY *v.* REED.

(24 Howard, 284-287. 1860.)

APPEAL from U. S. District Court, District of Wisconsin.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The bill seeks to enforce a lien secured by mortgage on twenty acres of land, in what is denominated Finch's addition to Milwaukee. The mortgage debt became due in February, 1839. It is difficult to say that, were the bill standing on demurrer, a sufficient description of the land claimed as bound for the debt could be established to justify an affirmative decree. But the view we take of the case renders this question immaterial.

In 1837 George Reed executed the mortgage to the Cleveland Insurance Company for \$22,000, including the greater portion of a quarter section of land, part of which was covered by previous mortgages to others. These were acquired and foreclosed, and the title vested in James H. Rogers, the purchaser, and only material respondent to this suit. He took possession of the quarter section in 1838, claiming it as his own under previous mortgages of which he was assignee, and which he foreclosed, and became the purchaser of

the equity of redemption, and he also claimed title under five tax sales and deeds founded on them.

§ 748. *In Wisconsin bills to enforce a trust must be brought within ten years after the cause of action accrued.*

In his answer Rogers relies on the act of limitations of Wisconsin, passed in 1839, which provides that "bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in *all other cases* not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and *not after* that time."

To establish the fact of adverse possession, and to negative the conclusion that Rogers did not recognize the trust, the parties agreed "that for the purpose of bringing the above-entitled suit to a hearing at the present term, it shall and may be taken as true and proved for all the purposes of this case, that the defendant, Rogers, has been in actual and continual possession and occupancy of the southeast quarter section 37, township 7, range 22 east, described in the bill of complaint in this suit, since some time in the year 1838, and up to this time; and during all that time has openly controlled the same, and improved some portion of the premises."

§ 749. *A party in possession and holding adversely does not charge himself as trustee by buying in a pretended right to the premises at a bankrupt sale.*

To onerate Rogers with the obligation of a mortgagor and trustee, the complainant introduced a record from the bankrupt court held in Wisconsin, showing the proceedings against George Reed as a voluntary bankrupt under the act of congress of 1841. The proceeding was admitted on the hearing to be in all respects regular. On the 23d of July, 1842, Reed was declared to be a bankrupt, and his property and rights of property were vested in an assignee appointed by the court. He advertised Reed's interest in the property in controversy to be sold, and on the 3d day of May, 1843, it was sold, and purchased by Rogers, he being the best bidder, for the sum of \$6, who took a regular deed for the same on the 6th day of July, 1846, in conformity to the fifteenth section of the bankrupt law.

The object of introducing this evidence by the complainant was to avoid the operation of the act of limitations, by showing that, by his purchase, Rogers stood on the same footing of mortgagor that George Reed had stood before his bankruptcy, and that the assignee's deed to Rogers was not ten years old when this suit was brought.

The assignee came in as trustee by force of the decree declaring Reed a bankrupt; he held the land as Reed had done, and by the deed Rogers assumed the same position, because, by the proviso to the second section of the bankrupt law, the lien secured by the mortgage was excepted. The main question as regards the effect of this deed is, to what time does the title acquired by Rogers relate. It vested in him by its terms such title as the bankrupt had at the time of his bankruptcy, which was the date of the decree declaring him a bankrupt. To this effect is the fifteenth section of the act.

This suit was brought in 1856, and the order declaring Reed a bankrupt was made in 1842, so that Rogers held the relation of mortgagor to the complainant more than ten years before this suit was brought. But we deem this proceeding in bankruptcy altogether immaterial. Rogers claimed to own the quarter section in fee, and held it in actual adverse possession in 1839, when the ten years' act of limitation was passed. The act then began to run, and ran on so as to complete the bar in 1849.

We do not doubt that the act applies to this suit. The bill prays that the equity of redemption be foreclosed, or that the undivided interest, to the extent of twenty acres in the quarter section alleged to be covered by the mortgage, be sold, and the proceeds appropriated towards paying the debts secured. As neither of these modes of relief are cognizable at law, and the only remedy is in equity, it is manifestly barred by the terms of the act.

By a previous provision of the act of 1839 (section 37), where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred; and what we mean to say is that the remedies demanded to be enforced by the bill have no corresponding remedy at law, and therefore fall within the fortieth section of the act.

As respects the other defendants to the bill, no relief can be had against them. By his purchase of the bankrupt's title, Rogers took the equity of redemption, and cut off all claims to the land the defendants had, assuming the statements in the bill to be true.

We forbear to express any opinion on the defense relied on by Rogers in his answer, namely, that he had purchased and had deeds for the said quarter section from several tax collectors, which he alleges are valid; and if not valid, that they are confirmed by adverse possession and the operation of the three years' act of limitations. It is ordered that the decree of the circuit court dismissing the bill be affirmed.

BEAUBIEN v. BEAUBIEN.

(28 Howard, 190-208. 1859.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court of the United States for the district of the state of Michigan. The bill was filed by the plaintiffs against the defendants, claiming to be tenants in common with them in a tract of land now lying in the city of Detroit, each party deriving title from a common ancestor, who made the settlement as early as the year 1745, under a concession from the French government. The tract contained five arpens in front on Lake Erie, and eighty arpens back. The ancestor, John Baptiste Beaubien, died in 1793, having had the uninterrupted possession of the property from the time of the concession in 1745, leaving a widow and several children. Two of the sons, Antoine and Lambert, resided with their father at the time of his death, and continued in the possession and occupation with their mother till her death in 1809.

In 1804 Antoine, one of the heirs in possession, applied to the board of commissioners to adjust land claims, under the act of congress of 1804, to confirm his claim to the land; and which was confirmed accordingly, and a patent issued in 1812. Acts of congress, 26th March, 1804; 3d March, 1805; 3d March, 1807. Lambert, the other brother, continued in the joint occupation of the tract till his death in 1815, and subsequently, in 1818, Antoine conveyed to the heirs of Lambert a moiety of the premises, and the present occupants and defendants are the descendants of the two brothers, or purchasers from them under this title. The tract constitutes a portion of the city of Detroit, and is averred in the bill to have been worth, at the time of the filing of it in 1855, from half a million to a million of dollars, exclusive of the improvements.

The case was presented to the court below on demurrer to the bill, and on

pleas by some of the defendants, as *bona fide* purchasers for valuable consideration, without notice. The plaintiffs aver in the bill, in addition to the facts already stated, that they are the descendants of the brothers and sisters of Antoine and Lambert, from whom the title of the defendants is derived, and that Antoine and Lambert and their descendants possessed and occupied the tract in subordination to the right and title of their co-tenants, and that they were permitted to possess and occupy the same in confidence that they so held the premises for the common benefit of all parties interested. They further aver that they verily believed that the brothers, Antoine and Lambert, and their legal representatives, were acting in good faith in this respect, until about the year 1840 they discovered, after examination and inquiry into the facts and circumstances, that they intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises.

The bill further states that Antoine, in his life-time, and his son, who is one of the defendants, and the heirs of Lambert, have conveyed to divers individuals rights in the said tract; that, in some instances, they made donations without consideration; in others, conveyances for a pretended consideration, and that there now are in possession, as heirs, donees, and purchasers of different portions of the premises, several hundred persons, most of whose names are unknown to the plaintiffs, which persons set up claims and pretended rights and interests therein. And further, that neither Antoine nor Lambert's heirs, down to the year 1834, committed any open or notorious act, inconsistent with the rights of the plaintiffs, or in any way disavowed the trust and relation as co-tenant, or of brothers or co-heirs, nor in any manner asserted any title to the land, to the exclusion of their rights.

The court decreed upon the demurrer to the bill, and also upon the pleas, in favor of the defendants. The case comes before us on an appeal from this decree. Antoine and Lambert, the two sons of J. B. Beaubien, the common ancestor, and those claiming under them, have been in the exclusive possession of the premises in question since 1793, a period of sixty-two years before the commencement of this suit. The plaintiffs and those under whom they claim, during all this time, as averred in the bill, resided in Canada, and, as appears, most of them in the county of Essex, in the neighborhood of the premises. The four hundred arpens which, in 1793, were worth some six or seven thousand dollars, now embrace a portion of the city of Detroit, and are worth, with the improvements, over a million of dollars; and for aught that is averred in the bill or appears in the case, no right has been set up by them, or by those under whom they claim, to the title or the possession of the premises, until the filing of the bill; no claim to the rents and profits, or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs.

§ 750. *In cases involving the establishment of an implied trust, equity follows the law in applying the statute of limitations.*

The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law in applying the statute of limitations. *Kane v. Bloodgood*, 7 John. Ch., 91; *Hovenden v. Annesly*, 2 Sch. & Lef., 607.

There are two acts of limitation in the state of Michigan, either of which bars the claim of the plaintiffs: 1. The act of May 15, 1820, which limits the right of action to twenty years after the same has accrued; and 2. The act of

November 15, 1829, which limits the right of entry to ten years, if the cause of action has then accrued. The language is: "No writ of right or other real action, no ejectment or other possessory action, etc., shall hereafter be sued, etc., if the cause of action has now accrued, unless the same be brought within ten years after the passage of this act, any law, usage or custom to the contrary notwithstanding." There is no saving clause in this as to infants, *femes covert* or residence beyond seas.

§ 751. *An averment of concealment and fraud, to take a case out of the statute of limitations, must be specific as to the facts.*

The pleader has sought to avoid the operation of the limitation by an averment of concealment and fraud on the part of the defendants and those under whom they claim. The plaintiffs aver "that, until within the last few years, your orators and oratrixes, and those under whom they claim, verily believed and supposed that the said brothers Antoine and Lambert, and their legal representatives, were acting in good faith towards them, but that, about the year 1840, they discovered by information, after examination and inquiry into the facts and circumstances of the case, that the said brothers Antoine and Lambert, and their legal representatives, intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises."

This averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been made before. *Stearns v. Page*, 7 How., 819; *Moore v. Greene*, 19 id., 69.

Here, no acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood, and almost in sight of the city, which has, in the meantime, grown up on the premises. We think the statute of limitation applies, and that the decree of the court below should be affirmed.

§ 752. *In general.*—A suit in equity which is essentially a suit to recover the possession of land so nearly resembles the common law action of ejectment as to admit the defense of the statute of limitations. So held in an action to quiet the title to certain property in Indiana, title to which the complainants claimed by descent from William P. Hall, who died in 1857. The defendants had been in possession for over forty years under a deed executed under a decree for partition, and had made improvements, and their possession and claim was known to claimants. *Hall v. Low*,* 12 Otto, 461.

§ 753. In cases involving titles or claims touching real estate, courts of equity act by analogy to the statute of limitations. An action was commenced to enforce claims against certain property on the ground that it had been owned by the complainant's debtor and his partner as tenants in common. Kimmell, the debtor, conveyed all his property to a trustee to pay his debts in 1857, who joined in a conveyance by the partner to his sister-in-law in 1858, and she reconveyed, in 1864, to the partner. The property had been in possession of the defendants and those under whom they claim since before that date, and the action was commenced in 1871, claiming the deed by the trustee to be fraudulent. It was held that the claim was stale. *Godden v. Kimmell*, 9 Otto, 201 (§§ 815-18).

§ 754. Adverse possession for such length of time as will bar the legal title at law will bar an equitable title in a court of equity. *Lewis v. Marshall*,* 5 Pet., 470.

§ 755. A possession which will bar an ejectment is also a bar in equity. So held in an action in equity to obtain a conveyance of the legal title to lands in Kentucky to which complainants claimed to have an equitable title. *Hunt v. Wickliffe*, 2 Pet., 201.

§ 756. In equity as well as at law a statute of limitations is a bar when the conflicting titles

are adverse in their origin, and the one equitable and the other legal. *Fussell v. Hughes*, 8 Fed. R., 884.

§ 757. An adverse possession for twenty years bars an equitable title in Kentucky. So held in an action commenced in 1823 to recover certain lands in Kentucky. Nicholas Smith, one of the defendants, claimed title by purchase, with warranty, from John Jones, who claimed under Hournoy's patent, which was an equity older than the title of plaintiffs, but later in date than the patent under which they claimed. The deed was dated in 1797, and Smith had settled on the land in 1798, and lived there till his death, and there was a continued possession and residence on the land by him and those claiming under him till the commencement of the action, and valuable improvements had been made. Also where Smeltzer had purchased from South, an attorney in fact of complainant's ancestor, who assumed power of sale and had commenced to make improvements in 1786. *Boone v. Chiles*,* 10 Pet., 177.

§ 758. A bill claiming title and praying possession of land will be dismissed where the land has been in the adverse possession of others for twenty years. So held where Pindell filed a bill to have decreed to him, as the assignee of John R. Sloan, certain lands in Missouri. John Sloan died in 1818, claiming under a deed which had not been recorded and could not be found. John R. Sloan, his heir, reached his majority and had taken professional advice about his rights in 1838. The defendants had been in possession since 1836, claiming title under a partition sale. The action was commenced in 1857. *Pindell v. Mulliken*,* 1 Black, 585.

§ 759. Lapse of time will create a bar in equity where there is unexplained and unreasonable delay and the possessor is a purchaser without notice, independent of the statute of limitations. So held in a suit in equity to recover certain land in Ohio commenced about 1837. The plaintiff claimed under Stephen Scott, who was entitled to the land when he reached his majority, which he did in 1804. *Scott v. Evans*,* 1 McL., 486.

§ 760. Duress.—Equity will not give relief against duress, where the delay is protracted unreasonably and without excuse, and the subject-matter has largely increased in value, and the evidence is conflicting. So held in a case where a bill was filed in October, 1869, to set aside a deed on the ground of duress. The deed was executed in July, 1857. The evidence as to the duress was conflicting, and the property had increased greatly in value owing to permanent improvements made by defendants. The only explanation for the delay was that plaintiff stood in fear of a person since dead. *Murphy v. Paynter*,* 1 Dill., 333.

§ 761. Fraud.—The statute of limitations may be set up in behalf of a claim to real property founded in fraud, even if a knowledge of the facts which constitute the fraud was possessed by the adverse claimant. So held in a suit of equity, praying a decree of certain land granted to Williams, and by him conveyed to defendant, included in complainant's entry. The bill was filed in 1824. In 1784 complainant entered the lands, which lay in Tennessee. He assigned the entry in 1785 to Joseph Erwin, who reconveyed part in 1794 and part in 1811. In 1791 Sampson Williams made an entry, which included part of complainant's entry, and obtained a grant in 1793. A survey was made in 1792 by Williams, who was a government surveyor, which was erroneous owing to the thick underbrush. The fraud in the survey, if any, might have been discovered in 1792 by Erwin. *Mitchell v. Thompson*,* 1 McL., 96.

§ 762. Laches.—A judgment in ejectment had been recovered by defendant for the recovery of certain land in Tennessee, and the complainant prayed an injunction, and that defendant might be decreed to convey all his interest in the premises to complainant. The bill set forth the execution of a bond in 1787 by Isaac Coulson to Josiah Payne, conditioned for the conveyance of the tract of land or the payment of £100; that the obligor elected to convey the land, but died in 1791 in Virginia, leaving the defendant (Coulson) as his heir; that a grant of the land was issued in 1787, but no valid conveyance was made to Payne; that Payne took possession in 1799 or 1800, and it had been occupied by him and those claiming under him ever since. Coulson died in 1791, and Payne had tried to obtain conveyances of the interests of his heirs through the courts of Virginia in 1798 and 1797, and in so doing had been aided by Coulson's widow and brother. Payne died in 1805. There were no equity courts in Tennessee at this time. It was held that complainants had used more than ordinary diligence, and were entitled to the relief asked. *Coulson v. Walton*,* 9 Pet., 62.

§ 763. Acquiescence.—Long acquiescence and laches by parties out of possession cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the court. So held where a bill was filed in 1828 to obtain a title and possession of certain lands in Ohio. Robert Lawson executed a tripartite agreement in 1794, conveying a fifth of a large tract of land in trust for his wife. In 1796 he made an assignment of one-third of the tract to O'Bannon, which he located so that it interfered with the property conveyed by the trust-deed. In 1799, when he applied for a patent, a caveat was filed by a son-in-law of Lawson. Lawson died in 1805, in Virginia, and his wife died in 1809. O'Bannon died in 1812. In 1816 a patent was

issued to the executor of O'Bannon, who had conveyed to defendant's grantor in 1818. *Wagner v. Baird*,* 7 How., 234.

§ 764. A bill was filed in 1840 by the heirs of Isaac Bowman and another praying that the defendants be enjoined from exercising a ferry right, and for an accounting. In 1802 Bowman, being the owner of a tract of land on the Ohio river, gave a power of attorney to Gwathney to lay out a town. The town was laid out and the land conveyed to trustees, reserving what rights Bowman might have to ferries. Bowman died in 1826, devising to complainants his ferry rights, and they conveyed them in 1830 to Burnley. In 1802 the territorial government of Indiana granted a license to Clarke, one of the town trustees, to keep a ferry. In 1807 a similar license was given to one Joseph Bowman. Subsequently these rights were united and conveyed to defendant. Bowman's agent knew of the existence of the ferry. It was held that, even if Bowman was ignorant of its existence, the defendant's title, accruing from lapse of time, was a bar to the relief asked. *Bowman v. Wathen*,* 1 How., 189.

§ 765. Where a title bond was assigned and a deed was subsequently made to the assignor, and duly recorded, held that, after a delay of fifteen years, the assignee of the bond was not entitled to relief, especially as against subsequent equities. *In re Butler*,* 2 Hughes, 247.

§ 766. Trustee of a constructive trust.—An express trust cannot be enforced if disavowed for such length of time as would make an adverse possession a bar. Time protects the trustee of a constructive trust, and such a trust will seldom be enforced after the lapse of twenty years. Searcy became entitled to a tract of land in Kentucky. He entered into a bond in 1781 to convey half to Hoy, and the other half he conveyed to Martin. Martin conveyed to Hoy, and in 1781 Hoy assigned the bond to George Boone, and he assigned to Thomas Boone. In 1785 Hoy obtained a patent in his own name for the entire tract. Thomas Boone was in Kentucky at various dates, but never took possession of the land or instituted any suit therefor. In 1828 he instituted this suit for the land, and, having died, it was continued by his heirs. Certain of the defendants claimed that George Boone assigned the land to John South, with the consent and authority of Thomas Boone, if the bond were ever assigned to him, and that they purchased from South. *Boone v. Chilea*,* 10 Pet., 177.

§ 767. Trustee.—Where there is concurrent jurisdiction in the courts of common law and of equity, the limitation prescribed by the court of law governs the court of equity. The statute of limitations begins to run in favor of a trustee when he has parted with all control over the property and is discharged. So held where James R. Smith died in 1817 and by his will divided his property in equal shares among his four children, the three daughters to receive one-third of their shares absolutely and the other portion subject to a limitation. In 1829 the entire estate, except the two-thirds of three-fourths, was divided. The remainder was conveyed by the trustees to one Dyson, who conveyed a third to each of the daughters in fee, the daughters joining in the deeds. In 1843, a doubt having arisen as to the title of Mrs. Janet Clarke, one of the daughters, her son executed a release of all his interests in the property. Mrs. Clarke died in 1847, and her son in 1855. In 1869 this suit was commenced by the heirs of George Clarke, claiming that his mother had only a life estate and he a remainder in fee, of which he was defrauded by the trustees' deed to Dyson. *Clarke v. Boorman*,* 18 Wall., 493.

§ 768. A trustee cannot claim adversely to those for whom he acquired and holds the property, nor can he deny the title of his beneficiary. *Railroad Co. v. Durant*, 5 Otto, 576.

§ 769. Where, in 1808, Collins obtained permission to take possession of a certain lot near Mobile, and made a contract with Kennedy to improve it and lay a foundation for a perfect title and to share the lot equally, and Kennedy acquired a hostile title under which he sold to a third person, and an action was brought in 1847 by the heirs of Collins to establish their right, it was held that the non-residence of complainants and the late discovery of the fraud accounted for the delay and apparent laches of complainant. *Hallett v. Collins*, 10 How., 174.

§ 770. Constructive trust.—In cases where a trust is constructive and also arises out of fraud, lapse of time is no absolute bar in equity. The matter is left to the equitable discretion of the court, but will not be enforced when stale; a suit in equity to enforce the right of an equitable owner is brought within a reasonable time if brought within the time limited for bringing an action at law. *Stevens v. Sharp*,* 6 Saw., 118.

§ 771. Resulting trust.—A resulting trust in lands is barred after the lapse of twenty-one years if possession of an adverse claimant is notorious and adverse. A charge to the jury to that effect in an action to recover an interest in certain land in Pennsylvania was sustained. A. Turnbull died seized of the land in 1826, leaving four children as his heirs. A. Turnbull, Jr., died in 1835, leaving J. Turnbull, Jr., as his heir. In 1827 Drysdale, as administrator of A. Turnbull, recovered a judgment against J. Turnbull and A. Turnbull, Jr. (two of the heirs), and on execution sold their interest in the land. His attorney bought the land and soon after conveyed it to him. By deed recorded in 1846, Drysdale and his wife (an heir) and Margaret Turnbull (an heir) conveyed the premises to Roberts, whose possession was thereafter notorious and adverse. *King v. Pardee*, 6 Otto, 90 (§ 471).

3. Possession under Color of Title.

SUMMARY—Color of title defined; question of law, § 772.—Entry without title or claim, § 773.—Unregistered deed, § 774.—Title of record; Illinois, § 775.—Fraud in grantor, § 776.—Tennessee, § 777.—Intrinsic fairness and honesty, § 778.—Deed void on its face, § 779.

§ 772. Color of title is that which in reality is no title. What is color of title is matter of law, and when the facts exhibiting the title are shown, the court will determine whether they amount to color of title. But good faith in acquiring the color of title is a question of fact. A tax deed is color of title. *Wright v. Mattison*, §§ 780-81.

§ 773. Whether an entry upon land, without title or claim of title, be a mere trespass or an ouster or disseizin of the true owner is a question of fact depending on the nature of the acts done and the intent of the person so entering. If he enters under color of title, his possession is deemed to be co-extensive with his title, but if the true owner is in possession, the possession of the disseizor is limited to his occupancy. *Clarke v. Courtney*, §§ 782-86.

§ 774. An unregistered deed is a sufficient title on which the bar of the statute of limitations can be founded. An innocent purchaser, under a patent granted by mistake, and holding under such a deed, and being in possession adverse to the legal owner, will be protected in equity. *Lea v. Polk County Copper Co.*, §§ 787-90.

§ 775. Under the limitation-law of Illinois, it is not necessary that the title of the possessor be evidenced by acts of record. If the source or foundation of the title is of record, it is available to every person claiming a legal or equitable interest under it who can connect himself with it by such evidence as applies to the nature of the right set up. *Dolton v. Cain*, § 791.

§ 776. Even if the grantor in a deed be justly chargeable with fraud, yet if the grantee did not participate in the fraud, and, when he received his deed, had no knowledge of it, but accepted the same in good faith, the deed, upon its face, purporting to convey a title in fee, will give color of title. *Gregg v. Sayre*, §§ 792-93.

§ 777. Under the statute of limitations of Tennessee of 1797, peaceable possession of lands for seven years under a grant or conveyance founded upon a grant vests the complete title in the person in possession. Possession under a grant, which is subsequent to and interferes with another, will be protected by the statute. *Piles v. Bouldin* §§ 794-95.

§ 778. The words "want of intrinsic fairness and honesty" in the fifteenth section of the Texas statute of limitations relate to some infirmity in the muniments of title, or deduction of title, indicating a want of good faith in obtaining it, and not to a constructive or actual notice of an elder title. *Davila v. Mumford*, §§ 796-97.

§ 779. A deed conveying a tax title, which is void upon its face, will not support the adverse possession necessary to sustain a title under the statute of limitations of 1835, of Illinois. Such a deed will not give color of title. *Moore v. Brown*, § 798.

[NOTES.—See §§ 799-832.]

WRIGHT v. MATTISON.

(18 Howard, 50-60. 1855.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The questions determined by the circuit court whose decision we are called on to review arose upon the construction of two statutes of the state of Illinois, which limit the right of action against the possessors of lands, held by purchasers in virtue of sales and conveyances under the authority of the state, for the non-payment of taxes.

The provisions of the statutes in question are as follows: January 17, 1835. Section 1. "That, hereafter, no person who now has, or hereafter may have, any right of entry into any lands of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer authorized by the laws of the state to sell such lands for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such lands on

execution, or under any order, judgment or decree of any court of record, shall make any entry therein except within seven years from the time of such possession being taken; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

By the statute of 1839 it is enacted, "That, hereafter, every person in the actual possession of lands or tenements, under claim and color of title made in good faith, and who shall, for seven successive years after the passage of this act, continue in such possession, and shall also during the said time pay all the taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise or descent, before said seven years shall have expired, and shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section."

In this case in the circuit court, which was an action of ejectment, the plaintiff's lessee, the defendant in error here, exhibited in proof a release from the widow of the patentee from the United States of the premises in question; also deeds of conveyance from the heirs of the patentee, with the exception of one of those heirs, who was a minor, and whose estate or interest in the premises there seems to have been no attempt to transfer. The lessee of the plaintiff further proved the possession of the premises by the defendant at the commencement of the action on the 15th of July, 1851.

The defendant, to maintain the issue on his part, offered to read in evidence to the jury a deed of the 20th of December, 1823, from the auditor of public accounts of the state of Illinois, to Nathaniel Wright and Joel Wright for the land in controversy, reciting the public sale of those lands by the auditor in pursuance of the several acts of the general assembly of the state, and of the act entitled "An act for levying and collecting a tax on land and other property, approved February 18, 1823," and the bidding off the said lands to Nathaniel Wright and Joel Wright as the best bidders, for the sum of \$11.06, being the tax and costs due thereon for the years 1821 and 1822.

In connection with the foregoing deed from the auditor, the defendant offered to read in evidence to the jury a deed, properly executed and recorded, from the said Nathaniel Wright to the defendant, Joel Wright, for the northeast quarter of section 34 (the premises claimed); and offered further to prove to the jury that the said defendant had been in the actual possession of the premises for more than seven years next preceding the commencement of this suit, and had paid all the taxes assessed thereupon; and the defendant stated by his counsel that the purpose of offering the evidence was to secure to the defendant the benefit and protection of the seven years' limitation laws of 1835 and 1839.

To the introduction of this evidence by the defendant the plaintiff objected, assigning for his objection the following causes: 1. That the defendant had neither proved, nor offered to prove, that the requisitions of the revenue law of 1823 had been complied with, prior to the sale of said land for taxes as stated in the auditor's deed, and that the deed was not *prima facie* evidence of these facts. 2. That said deed was void upon its face.

The court excluded the evidence thus tendered by the defendant, who ex-

cepted to the opinion of the court. The defendant next offered in evidence a deed from the auditor of public accounts to the defendant, dated on the 10th day of January, 1833, in which it is stated that, in conformity with all the requisitions of the several laws in such cases made and provided, the auditor had, on the 11th day of January, 1831, exposed to sale a certain tract of land, being the northeast quarter of section 34, in township 7 north, in range 4 east of the fourth principal meridian, for the sum of \$1.82, being the amount of the tax for the year 1830, with the interest and costs chargeable on the said lands; and that the said Joel Wright had offered to pay the aforesaid sum for the whole of the said land; and the said Wright having paid the said sum into the treasury of the state, the auditor thereby granted and conveyed to the said Wright the whole of the northeast quarter of section 34 as above described (being the land in controversy), subject to the right of redemption, as provided by law.

This last mentioned deed from the auditor was admitted in evidence without objection, and, as well as the former deed from the auditor to Nathaniel and Joel Wright, bearing date on the 20th of December, 1823, was shown to have been regularly recorded in the proper recording office.

By a statement of facts agreed between the counsel, it was in proof on the trial that Joel Wright, claiming that he and his brother, Nathaniel, were owners and tenants in common in fee-simple of the land in controversy, took possession of it in 1829, by inclosing and putting under actual cultivation a portion thereof, and that, from time to time, he had extended his inclosures, until, in 1841, he had all the said quarter section under actual cultivation, with the exception of about twenty acres; and that, from the date last mentioned forward, he had continued in actual possession and cultivation of the said land; and had paid all the taxes assessed upon the said land from the year 1840 to 1851, inclusive of both years, and that the land was of the value of more than \$3,000.

The evidence having been closed on the part of the plaintiff and on that of the defendant, the plaintiff moved the court for the following instructions to the jury, namely:

"That the deed offered in evidence by the defendant, of the 10th of January, 1833, from the auditor to the defendant, is of itself such a title as will protect a party in the possession of land under the act of 1839, provided it is made in good faith, and connected with the payment of taxes for seven successive years, and a continued possession for that time; but if the jury believe from the evidence that the defendant was in possession of the land in controversy, claiming to be the owner in fee, in the year 1829, and so continued to remain in possession until the year 1833, then he could acquire no title by permitting the land to be sold for taxes, and becoming the purchaser thereof in 1831; and the auditor's deed to the defendant on the sale of 1831 for the taxes of 1830, given in evidence by the defendant, conveys no title, and is not a title obtained in good faith; and such a deed, if obtained in the manner aforesaid, is not such a title as brings his possession within the protection of the limitation acts of 1835 and 1839."

This last instruction having been given as prayed by the plaintiff was excepted to by the defendant. After the closing of the testimony, there were, on the part of the defendant, five several instructions prayed of the court. Of these, the first two having been granted, and no exception to them having

been reserved, they are therefore not properly subjects for comment here. The third one of these instructions being deemed unimportant, under the view which we take of this cause, will be dismissed without particular remark.

The fifth instruction prayed for by the defendant below, the materiality of which will hereafter be shown, was in the following words, namely: "That the questions whether the deed given in evidence was made in good faith, and whether the defendant has occupied the said land under said deed in good faith, are questions of fact which must be decided by the jury upon consideration of all the facts and circumstances given in evidence upon the trial in this cause." This fifth instruction the court refused to grant, except with the following qualification, namely: "That this, as a general proposition, is true, but as a matter of law the court charges the jury that any man who is in possession of land, claiming to be the owner thereof, and who permits the land to be sold for the non-payment of taxes, and who himself becomes the purchaser, and acquires a deed under such purchase, such title cannot be said, within the meaning of the law, to be made in good faith." To the above refusal and qualification by the court, the defendant in the ejectment excepted.

From the sketch which has been given of the proceedings in this cause in the circuit court it is shown that the defendant did not found his title either exclusively or principally upon the provisions of the statute of 1835, but relied in defense of that title and of his possession equally, if not chiefly, upon the statute of 1839, and the acts of the auditor performed in the execution and under the authority of the latter law. And it is in viewing this cause as controlled by the provisions of the statute of 1839, that we regard it as entirely disembarassed of any doubt or perplexity which might surround an attempt to rest its decision upon a construction of the law of 1835. Hence we have dismissed from our consideration the several questions discussed and ruled in the circuit court, with reference to the law of 1835, as being irrelevant to the points regularly involved in this cause, which depend essentially upon the statute of Illinois of 1839.

By the first section of this statute, as we have already seen, it is declared: "That hereafter every person in the actual possession of land or tenements under claim and color of title made in good faith, and who shall for seven successive years after the passage of this act continue in such possession, and shall also during said time pay all taxes legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements, to the extent and according to the purport of his or her paper title."

§ 780. "*Color of title*" is that which in appearance is title, but which in reality is no title.

There exists no controversy in this case as to the facts that the defendant in the ejectment proved the actual possession by him of the land, and the payment of all the taxes assessed thereon, for seven successive years previously to the institution of this suit. The proof of these facts by the defendant, therefore, left open, under the first section of the statute of 1839, the single inquiry, whether it was shown or attempted to be shown by him that he held under claim and color of title made in good faith.

We deem it unnecessary to examine in detail the numerous decisions adduced in the argument for the plaintiff in error, to define and establish the meaning of the phrase, "color of title." The courts have concurred, it is believed, without an exception, in defining "color of title" to be that which in

appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith.

We refer to a few decisions by this court which are deemed conclusive to the point that a claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitation, other requisites of those statutes being complied with. We will lastly, upon this point, refer to a recent decision of the supreme court of the state of Illinois, which not less for its intrinsic strength than on account of the circumstance that it is an interpretation by the highest judicial authority of the state, of the peculiar local legislation of that state, is entitled to special attention and respect.

In the case of *Gregg v. Sayre*, 8 Pet., 253, 254 (§§ 792-93, *infra*), in which the question was raised as to the effect of a deed impeached either for fraud in the grantor, or want of estate in him co-extensive with the terms of the instrument, this court say: "It is not necessary to decide whether these conveyances were fraudulently made by Ormsby (the grantor) or not. The important point is to know whether Gregg and wife (the grantees) had knowledge of the fraud if committed, or participated in it. This knowledge the circuit court charged the jury was immaterial, as the fraud of Ormsby rendered the deeds void, and consequently they could give no color of title to an adverse possession. This construction is clearly erroneous. If Ormsby be justly chargeable with fraud, yet if Gregg and wife did not participate in it; if, when they received their deeds, they had no knowledge of it, there can be no doubt that the deeds do give color of title under the statute of limitations. Upon their face the deeds purport to convey a title in fee; and having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises."

The case of *Ewing v. Burnett*, 11 Pet., 41, was one in which plaintiff and defendant claimed under conveyances from the same grantor. The grantee in the junior deed relied upon his title as being protected by proof of adverse possession for the time of limitation. The introduction of this deed was objected to, because, as it was alleged, the defendant had notice of the claim of the grantee in the elder conveyance. To an objection thus urged to the introduction of the junior deed, this court said that "there were two answers: first, that the jury might have negatived the proof of such notice; secondly, though there was such notice of a prior deed as would make a subsequent one inoperative to pass a title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar."

So late as the year 1851, in the case of *Pillow v. Roberts*, 13 How., 472, speaking of the protection extended by statutes of limitation to a possession held under claim of color of title, this court say: "Statutes of limitation would be but of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world." And again, in the same case,

it is said, in order to entitle the defendant to set up the bar of the statute after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue of lands sold for the non-payment of taxes; he was not bound to show that all the prerequisites of the law had been complied with in order to make the deed a valid and indefeasible conveyance of title. If the court should require such proof before the defendant could have the benefit of this law it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the statute altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title.

The case of *Woodward v. Blanchard*, decided by the supreme court of Illinois within a few months past, was like the case at present under view — an action of ejectment against a purchaser of land sold for the non-payment of taxes.

The defendant in the ejectment relied for the maintenance and protection of his title and possession upon the statute of Illinois of 1839, already quoted; professing to hold under claim and color of title as expressed in that statute, all the other requirements of the law being fulfilled. The defense thus alleged superinduced necessarily a construction of the statute as to the signification of the phrase, "claim or color of title made in good faith," and in their interpretation the court institute a comparison between its provisions and those of the statute of 1835, and point out the distinctive features of each. With respect to the law of 1839 they say: "There is in this act not only a change in the facts, but an evident intention to dispense with part of the requirements of the former act, and to relax the strictness required in others. Possession is retained in one case, but residence is dispensed with; connection in the chain to be deduced of record, and its deduction from specified sources, are dispensed with; in place of these, claim and color of title made in good faith, with the payment of taxes, are substituted as to lands in possession. But, as to another class of lands (vacant and unoccupied), possession and claim are both dispensed with, and the party is only required to show color of title in good faith." Further on the court say: "We are, therefore, under this defense, not driven to the springs or sources of the title to inquire if they be pure, nor to the successive channels through which it may pass, for the purpose of removing obstructions to or difficulties in its course and transmission. But we come at once to the party defendant to inquire if he had a claim and color of title with his possession at the beginning of this period; if they were made in good faith, and his possession continued and was accompanied by the payment of taxes for seven successive years." What, say the court, is claim? The act of taking possession, if otherwise unexplained, will be referable to the paper title, and understood as making claim under it. Color of title may be made through conveyances, or bonds, or contracts, or bare possession under parol agreements.

Nor is it at all important whether the title be weak or strong; for color of title is required to establish an adverse possession for the operation of the statute, which commences by disseizin of the rightful owner with a claim of the land. But our statute requires this color of title to be accompanied by a written evidence, "a paper title," and an act or motion of the mind. It must be in good faith. Defects in the title may not be urged against it as destroying color, but, at the same time, might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the

vendee, if they were known to him, and he believed the title therefore to be fraudulent and void.

§ 781. *What is color of title is a question of law; what is claim of title in "good faith" is a question of fact. Tax title is color of title.*

What is color of title is matter of law, and when the facts exhibiting the title are shown the court will determine whether they amount to color of title. But good faith in the party in claiming under such color is purely a question of fact, to be found and settled as other facts in the cause. We can entertain no doubt in this case that the auditor's deed to the purchaser at the tax sale is color of title in Woodward, in the true "intent and meaning of the statute, and without regard to its intrinsic worth as a title. "Good faith" (say the court) "is doubtless used here in its popular sense as the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion or imbecility, and without regard to what it should be from given legal standards of law or reason."

We have quoted at some length from the opinion of the supreme court of Illinois, both on account of the clearness and accuracy of its reasoning, and on account of the respect which is due to it as in interpretation of a statute of the state by her supreme judicial authority. We entirely approve of the exposition of the supreme court of Illinois in its opinion of what constitutes color of title, upon well established general principles, and within the scope and meaning of the statute of 1839, and in relation to the nature of the question of what constituted good faith in the possessor of such colorable title, and also as to the manner in which that question should be determined, namely, as a question of fact determinable by the jury, and not by the court.

But the court in the case before us withdrew from the jury, and assumed upon itself the right of deciding upon the motives and intention of the defendant in the ejectment; and it was with the view, doubtless, of exercising this function that the qualification to the fifth prayer of the defendant was added by the court, and that the court had previously, at the instance of the plaintiff, instructed the jury that although the deed of the 10th of January, 1833, from the auditor to the defendant, was of itself such a title as would protect the party in possession under the act of 1839, connected with payment of taxes and continued possession for the period of limitation, yet, if the defendant, being in possession of the land in controversy, had permitted it to be sold for taxes and had himself become the purchaser thereof, the deed of the auditor in pursuance of such sale could convey no title to the defendant, and was not a title obtained in good faith. The accuracy or inaccuracy of the legal positions taken by the court in this instruction we deem it not necessary at present to determine.

We hold that in assuming to decide upon the question of good faith on the part of the defendant, the court exerted an authority not legitimately belonging to it; a power exclusively appertaining to the jury. We further hold that it was error in the court to decide as it did upon the prayer of the plaintiff in the ejectment, and by its qualification annexed to the fifth prayer of the defendant, that the deed from the auditor of the 10th of January, 1833, was not such an instrument as could be adduced in evidence under the statute of 1839, in order to show color of title. We are therefore of the opinion that the decision of the circuit court be reversed, and that this cause be remanded to that court, with directions to order a *venire facias de novo* for the trial thereof, in conformity with the law as herein expounded.

CLARKE v. COURTNEY.

(5 Peters, 319-357. 1831.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error founded on a judgment of the circuit court in the district of Kentucky in an action of ejectment, in which the plaintiff in error was the original plaintiff. The case is before us upon certain bills of exceptions taken by the plaintiff; and to the consideration of these the court will address their attention without entering upon any examination of other facts not involved in the decision of them.

Some of the defendants professing to hold a conveyance from the lessor of the plaintiff, Clarke, made by Carey L. Clarke, as his attorney in fact, offered in evidence the deed of conveyance, and the letter of attorney, "and gave testimony conducing to prove them. And Andrew Moore, the clerk of the Harrison circuit court, who brought the letter of attorney into this court under process for that purpose, desiring to return, and considering it his duty to retain possession of that instrument, by consent of plaintiff and defendants, departed with it, leaving a copy. And at a subsequent day, Moses L. Miller was introduced as a witness to prove the letter of attorney; who stated that, being summoned as a witness, he met with the clerk of Harrison aforesaid, in Georgetown, who showed him an instrument, the signature of which he examined and believed it to be the handwriting of James B. Clarke (the plaintiff's lessor), with whose handwriting he was well acquainted; and another witness was examined, tending to show that the instrument so shown by said Moore to Miller was the same previously read before this court as aforesaid. When Andrew Moore (the clerk of Harrison court) was about to resume possession of the letter of attorney and to depart, the attorney of the plaintiff declared that he had no objection. It is not pretended that any expectation of offering further proof was entertained or intimated to the parties. To the admission of the testimony of Miller the plaintiff objected, especially in the absence of the letter of attorney. But the court overruled the objection, and submitted the testimony to the jury, as tending to prove that instrument."

The letter of attorney purports to be made by "James B. Clarke of the city of New York, and Eleanor, his wife," to "Carey L. Clarke of the city of New York;" to be dated on the 7th of October, 1796, and to be sealed and delivered in the presence of three witnesses. The question is whether, under these circumstances, it ought to have been admitted in evidence.

§ 782. *Instruments under seal must be proved by their subscribing witnesses, and an agreement to permit the paper to be taken away pending the trial, and a copy left, does not dispense with this rule, and let in secondary proof of a lower grade.*

In the ordinary course of legal proceedings, instruments under seal purporting to be executed in the presence of a witness must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. Where he is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the next best secondary evidence is the proof of his handwriting; and that, when proved, affords *prima facie* evidence of a due execution of the instrument, for it is presumed that he would not have subscribed his name to a false attestation. If, upon due search and inquiry, no one can be found who can prove his handwriting, there is no doubt that resort may then be had to proof of the handwriting of the party who

executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence. Whatever may have been the origin of this rule, and in whatever reasons it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness.

The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. The instrument purports to be an ancient one; but no evidence was offered in this stage of the cause to connect it with possession under it, so as to justify its admission as an ancient deed without further proof. It is said that the conduct of the parties amounted to a waiver of the due proof of the original. We are of opinion that the production of the original was, under the circumstances, dispensed with by the parties, and that a copy of it was impliedly assented to as a substitute for the original.

But we do not think that the implication goes further and dispenses with the ordinary proof of the due execution of the original in the same manner as if the original were present. It would be going very far to draw such a conclusion from circumstances of so equivocal a nature. The rules of evidence are too important securities for the titles to property to allow such loose presumptions to prevail. It would be opening a door to great practical inconvenience; and if a waiver of the ordinary proof is intended it is easily reduced to writing.

It is also said that the language of the exception that the defendants gave testimony "conducting to prove" the instruments may well be interpreted by the court to have included all the usual preliminary proofs. We do not think so; to justify the admission of the lowest kind of secondary proof, it should clearly appear that all the preliminary steps have been taken and established. The court can presume nothing; there may not have been any preliminary proof whatsoever of the absence, death or incapacity of the witnesses; and yet there may have been some evidence "conducting to prove" the due execution of the instruments. And the very circumstance stated in the bill of exception, that Miller was introduced "as a witness to prove the letter of attorney," repels the presumption that any antecedent proof had been given which in point of law dispensed with the ordinary proofs. We think, then, that the testimony ought not to have been admitted, and that this exception is well founded.

The plaintiff having then given *prima facie* evidence of title, under a patent to Martin Pickett, of fifty-five thousand three hundred and ninety acres, and that the defendants were in possession of the land in controversy, and that the lessor of the plaintiff (Clarke) at the date of his deed and ever since was and had been a citizen and resident of the state of New York, and having relied solely on the demise from Clarke, the defendants offered in evidence certain exhibits. One of these purported to be a release of forty-nine thousand nine hundred and fifty-two acres by Carey L. Clarke, as attorney for James B. Clarke and John Bryant, on the 25th day of November, 1800, acknowledged before the surveyor of Scott county, and afterwards lodged with the auditor of public accounts. It recited that James B. Clarke and Eleanor, his wife, and John Bryant and Mary, his wife, had appointed Carey L. Clarke their attorney to sell, transfer and convey a certain tract on the waters of Eagle Creek, in the county of Scott and state of Kentucky, containing one hundred

thousand one hundred and ninety-two acres entered in the name of Martin Pickett, which tract of land was then held by Clarke and Bryant as tenants in common. It then proceeded to state, "now, therefore, I, the said Carey L. Clarke, attorney as aforesaid, in pursuance of an act of the legislature of the state of Kentucky, authorizing claimants of land within its commonwealth to relinquish, by themselves or their attorneys, any part or parts of their claims to the commonwealth, do hereby relinquish to the commonwealth of Kentucky all the right, title, interest, property, claim and demand of the said Clarke and Bryant of, in and to the hereinafter described tracts of land." Another exhibit purported to be a release, dated on the 25th of November, 1801, by Carey L. Clarke, as attorney in fact of John Bryant, in a similar form, and containing a similar relinquishment to the state of certain tracts of land, except that the attestation clause was in these words: "In witness whereof the said Bryant, by Carey L. Clarke, his attorney, hath set his hand and seal, this 25th of November, 1801. John Bryant, by Carey L. Clarke, his attorney. [L. s.]" The other exhibits need not be particularly mentioned.

To prove these instruments of relinquishment, or, properly speaking, that of James B. Clarke and wife, the defendants relied upon the power of attorney mentioned in the former bill of exceptions and the original relinquishment from the auditor's office; and proved the execution thereof by the surveyor of Scott county.

The plaintiff then moved the court to instruct the jury that the instrument [of relinquishment], under the proof, did not bind the plaintiff and could not bar his recovery. But the court overruled the motion, and instructed the jury that the said relinquishment for the forty-nine thousand nine hundred and fifty-two acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in the said relinquishment; and on motion of the defendants the court instructed the jury that if they believed the execution of the power of attorney from James B. Clarke to Carey L. Clarke and of the relinquishment in evidence [from Carey L. Clarke, as his attorney, of the date of the 25th of November, 1800], then it was incumbent on the plaintiff, to maintain this action, to show that the defendants, or some of them, were, at the service of the ejectment, outside of the several parts relinquished to the state. The opinions thus given and refused constitute the second bill of exceptions.

Various objections have been taken in the argument at the bar upon the matter of these exceptions. It is said that the relinquishment to the state, which was authorized by the act of 4th of December, 1794 (Littell's Laws of Kentucky, 222), has not been made in such a manner as to become effectual in point of law; for there has been no entry of the relinquishment in a book in the surveyor's office of the county, as prescribed in the statute, nor has the power of attorney been there recorded; and the state cannot take but by matter of record. Upon this objection it is not, in our view of the case, necessary to give any opinion.

It is said, in the next place, that the relinquishment purports to have been made in virtue of a power of attorney, recited in the instrument itself to be from James B. Clarke and his wife, and John Bryant and his wife; whereas the power produced purports to be from Clarke and his wife only, and therefore the latter power does not authorize the relinquishment, or, in other words, it was not that under which it was made. There is great force in this objection; but on this also we do not decide.

Another objection is that the power of attorney produced, even if duly executed, does not justify the relinquishment. It purports to authorize Carey L. Clarke "to sell, dispose of, contract and bargain for all or so much of said tract of land, etc., and to such person or persons and at such time or times as he shall think proper, and in our or one of our names to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same, as he shall think proper; provided always, that all deeds for the land are to be without covenants of warranty, or covenants warranting the title to the land from the patentee, and his assigns," etc.

§ 783. *A power authorizing an attorney to "sell, dispose of," etc., does not enable the attorney to relinquish to the state land for the extinction of its lien for taxes which are a charge upon the lands, but not a debt against the owner.*

The language here used is precisely that which would be used in cases of intended sales, or contracts of sale, of the land for a valuable consideration to third persons in the ordinary course of business. In the strict sense of the term, a relinquishment of the lands to the state, under the act of 1794, is not a sale. That act, after reciting that it is represented to the general assembly that many persons hold tracts of land subject to taxation, and are desirous of continuing their interest in only part thereof, and that others have claims to lands which they wish to relinquish without their being subject to the expense of lawsuits, proceeds to enact that it shall be lawful for any person or persons, his, her, or their agent or attorney, lawfully authorized so to do, to relinquish or disclaim his, her, or their title, interest, or claim, to and in any tract or part of a tract of land that he, she, or they may think proper, by making an entry of the tract, or that part thereof so disclaimed, with the surveyor of the county in which the land or the greater part thereof shall lie, in a book to be kept for that purpose, which said entry shall describe the situation and boundary of the land disclaimed with certainty, and be signed by the party in the presence of the surveyor, who shall attest the same; and that, by virtue of the aforesaid entry and disclaimer, all the interest of the party in the said tract shall be vested in the commonwealth, and shall never be reclaimed by the party, or his, her, or their representatives. The object of the act is to authorize a relinquishment, either on account of the land being subject to taxation, or to avoid lawsuits on account of conflicting claims.

It is not pretended that the present relinquishment would have been authorized by the letter of attorney on the latter account. It is supposed at the bar to have been done on account of the taxes due on the land, though that object is not avowed on the face of the deed. There is, accordingly, spread upon the record a transcript of the taxes laid on the land. By the laws of Kentucky (Act of 1799, s. 17, 2 Litt. L., 327), taxes constitute a perpetual lien on the land. But such taxes constitute no personal charge against non-residents. And the act of 1799 further provides, that where any person has paid, or shall on or before the 1st day of December then next, the tax on any tract of land which shall afterwards be lost or relinquished, the person losing shall, upon application to the auditor, receive an audited warrant to the amount paid by him, with a deduction of seven and a half per cent., which shall be receivable in taxes as other audited warrants are.

The effect of the Kentucky laws, then, so far as non-residents are concerned, is, that by their relinquishment they obtain no personal discharge from any personal charge; and that the only effect is that in the specified cases, if they have paid the taxes, they are, with a small deduction, reimbursed.

In point of fact, then, the relinquishment gives them nothing as a compensation for the land; but restores back again only the money (if any) which they have paid. Can such a relinquishment, for the purposes contemplated by the statute, be in any just sense deemed a sale? We think not. It is a mere abandonment of the title; or, in the language of the act, a relinquishment or disclaimer. The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons for a valuable consideration, and conveyance by deed without covenants of warranty. The very reference to covenants shows that the parties had in view the common course of conveyances, in which covenants of title are usually inserted, and the clause excludes them. The statute does not contemplate any deed or conveyance, but a mere entry of relinquishment or disclaimer of record. This entry constitutes a good title in the state. The state does not buy, nor does the party sell, in such case. It seems to us that the nature of such a relinquishment, amounting, as it does, to a surrender of title, without any valuable consideration, ought not to be inferred from any words, however general, much less from words so appropriate to cases of mere private sales as those in the present letter of attorney. The question whether such a relinquishment should be made or not is so emphatically a matter of pure discretion in the owner, in the nature of a donation, that it ought not to be presumed to be delegated to another without the most explicit words used for, and appropriate to, such a purpose. We think that the words of the present letter of attorney are not sufficient to clothe the agent with such an authority.

§ 784. *An attorney authorized to "sell," etc., passes no title by his deed in his own name as attorney, the deed not purporting to be the act of the principal.*

But if this objection were not insuperable, there is another, which, though apparently of a technical nature, is fatal to the relinquishment. It is that the deed is not executed in the names of Clarke and his wife, but by the attorney, in his own name. It is not, then, the deed of the principals, but the deed of the attorney. The language is: "I, the said Carey L. Clarke, attorney as aforesaid," etc., "do hereby relinquish," etc.; and the attesting clause is: "In witness whereof the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord, 1800. Carey L. Clarke. [L. s.]"

The act does not therefore purport to be the act of the principals, but of the attorney. It is his deed and his seal, and not theirs. This may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity.

The leading case on this subject is Coombe's case, 9 Co., 75, where authority was given by a copyholder to two persons, as his attorneys, to surrender ten acres of pasture to the use of J. N.; and afterwards, at a manor court, they surrendered the same, and the entry on the court roll was that the said attorneys in the same court showed the writing aforesaid, bearing date, etc., and they, by virtue of the authority to them by the said letter of attorney given, in full court surrendered into the hands of the said lord the said ten acres of pasture to the use of the said J. N., etc.; and the question was whether the surrender was good or not, and the court held it was good. "And it was resolved that when any has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in

his place and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority. And where it was objected that, in the case at bar, the attorneys have made the surrender in their own name, for the entry is that they surrendered, it was answered and resolved by the whole court that they have well performed their authority; for, first, they showed their letter of attorney, and then they, by the authority to them by the letter of attorney given, surrendered, etc., which is as much as to say, as if they had said, we, as attorneys, etc., surrender, etc., and both these ways are sufficient. As he who has a letter of attorney to deliver seizin saith, I, as attorney to J. S., deliver you seizin; or I, by force of this letter of attorney, deliver you seizin. And all that is well done and a good pursuance of his authority. But if attorneys have power, by writing, to make leases by indenture for years, etc., they cannot make indentures in their own names, but in the name of him who gives the warrant."

Such is the language of the report, and it has been quoted at large, because it has been much commented on at the bar; and it points out a clear distinction between acts done *in pais* and solemn instruments or deeds, as to the mode of their execution by an attorney. It has been supposed that the doctrine of Lord Holt, in *Parker v. Kett*, 1 Salk., 95, and better reported in 12 Mod. R., 467, intimated a different opinion. But correctly considered, it is not so. Lord Holt expressly admits (468) that the doctrine in Coombe's case, that he who acts under another ought to act in his name, is good law beyond dispute; and the case there was distinguishable; for it was the case of a sub-deputy steward appointed to receive a surrender, which was an act *in pais*. However this may be, it is certain that Coombe's case has never been departed from, and has often been acted upon as good law. In *Frontin v. Small*, 2 Lord Raym., 1418, where a lease was made between M. F., "attorney of J. F.," of the one part, and the defendant of the other part, of certain premises for seven years, in a suit for rent by M. F., it was held that the lease was void for the very reason assigned in Coombe's case. Lord Chief Baron Gilbert (4 Bac. Abridg. Leases and Terms for Years, I., 10, 140) has expounded the reasons of the doctrine with great clearness and force; and it was fully recognized in *White v. Cuyler*, 6 T. Rep., 176, and *Wilks v. Back*, 2 East, 142. If it were necessary it might easily be traced back to an earlier period than Coombe's case. 4 Bac. Abridg., Leases and Terms for Years, I., 10, 140, 141; Com. Dig., Attorney, C., 14; Moore, 70. In America it has been repeatedly the subject of adjudication, and has received a judicial sanction. The cases of *Bogart v. DeBussy*, 6 Johns., 94; *Fowler v. Shearer*, 7 Mass., 14; and *Elwell v. Shaw*, 16 Mass., 42, are directly in point.

It appears to us, then, upon the grounds of these authorities, that the deed of relinquishment to the state was inoperative; and consequently the court erred in refusing the instruction prayed by the plaintiff that it did not bind him; and in directing the jury that, if the execution of it was proved, it was a bar to the recovery of the land described therein.

This aspect of the case renders it unnecessary to decide whether, supposing the relinquishment good, it was incumbent on the plaintiff to show that the possession of the defendants, or some of them, was, at the time of the service of the ejectment, outside of the land relinquished. That point was before us in *Hawkins v. Barney*, 5 Pet., 457 (§§ 15-18, *supra*), at this term; and it was there decided that where the plaintiff's title-deed, as exhibited by himself, contains an exception, and shows that he has conveyed a part of the tract of land

to a third person, and it is uncertain whether the defendants are in possession of the land not conveyed, the *onus probandi* is on the plaintiff. Here the deed of relinquishment is exhibited on the part of the defendants to dispute the plaintiff's title to the land possessed by them; and it has been contended that this creates a distinction and throws the burden of proof on the defendants to show that the plaintiff has parted with his title to the particular land in controversy. The case, however, does not call for any absolute decision on this point; nor does it appear with certainty, from the evidence, that the relinquished land was within the boundaries of the land in controversy in the suit.

The third bill of exception states that on the trial of the cause, the plaintiff having given in evidence the patent to Pickett, and by mesne conveyances to Clarke, the lessor of the plaintiff, and proved that Clarke at the date thereof and ever since was resident in the state of New York, and that the title-deeds embrace the lands in controversy, and that the defendants were all in possession at the commencement of the suit, after the defendants had given in evidence the deed of relinquishment, and the court had given the instructions thereon, gave testimony conducing to prove that some of the defendants, namely, Hinton, Hughes, Vance, Gillum, Antle, Sally, Courtney, etc., were not within the limits set forth in the relinquishment; and these defendants all relying in their defense upon their possession, they gave in evidence a patent to James Gibson, 1st of March, 1793, under a survey of 1783, and a patent to Sterrett and Grant, 24th of October, 1799, under a survey in 1792 (reciting them), and gave testimony conducing to prove that Sally, Courtney, etc., were within the boundaries prescribed by the patent of Grant and Sterrett; and Hinton, Hughes, Gillum, Vance and Antle were within the bounds of the patent to Gibson; and touching the possession within Gibson's patent, the witness stated that, in 1796, Hinton entered within the patent of Gibson, claiming a part of the tract under that grant, and that the tenement had been occupied ever since; and at subsequent periods the other tenants, claiming under the said Hinton, had settled in the same manner under other parcels, claimed by them as parts of Hinton's purchase; and from the time of their respective settlements, their possession had been continued. The witness knew not the extent or boundary of any of the purchases and no title papers were produced.

And touching the possession within the patent to Sterrett and Grant, the witness stated that in 1791 or 1792, Griffin Taylor entered under that patent; that the tenements have been still occupied by Taylor and his alienees, and at periods subsequent the other tenants had entered and taken possession, claiming under the said Taylor, within the limits of the patent to Sterrett and Grant. No written evidences of purchase were offered.

Theroupon the plaintiff moved the court to instruct the jury: 1. That the possession of these defendants was no bar to the defendants' action. 2. That the statute of limitation could only protect the defendants to the extent that they had actually inclosed their respective tenements, and had occupied for twenty years preceding the commencement of the suit. The court overruled the motion, and instructed the jury that adverse possession was a question of fact; that under the adverse patents given in evidence it was not necessary to show a paper title derived under those adverse grants to make out adverse possession, but such hostile possession might be proved by parol. That an entry under one of the junior grants given in evidence by the defendants, and within the boundaries of the elder grant, without any specific metes and

bounds other than the abutments of the grant itself, did constitute an adverse possession to the whole extent of the abutments and boundaries under which such entry was made. To this refusal and opinion the plaintiff excepted, and the question now is whether the court erred in either respect.

§ 785. *A mere entry is not a disseizin; it may be at the election of the disseizee; but an entry and adverse possession is an ouster or disseizin. A mere trespasser cannot qualify his own wrong, and must prove that he ousted the owner if he asserts it.*

In considering the points growing out of this exception, it may be proper to advert to the doctrine which has been already established in respect to the nature and extent of the rights growing out of adverse possession. Whether an entry upon land, to which the party has no title and claims no title, be a mere naked trespass, or be an ouster or disseizin of the true owner previously in possession of the land, is a matter of fact depending upon the nature of the acts done and the intent of the party so entering. The law will not presume an ouster without some proof, and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseized, yet the latter is not bound to consider a mere act of trespass to be a disseizin. If a mere trespasser, without any claim or pretense of title, enters into land and holds the same adversely to the title of the true owner, it is an ouster or disseizin of the latter. But in such case, the possession of the trespasser is bounded by his actual occupancy, and consequently the true owner is not disseized except as to the portion so occupied. But where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For, if the true owner be at the same time in possession of a part of the land, claiming title to the whole, then his seizin extends, by construction of law, to all the land which is not in the actual possession and occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title.

§ 786. *The owner of land holding part in possession has seizin of all within his boundaries not actually occupied by a trespasser, or party holding under a defective title.*

The reason is plain; both parties cannot be seized at the same time of the same land under different titles, and the law, therefore, adjudges the seizin of all which is not in the actual occupancy of the adverse party to him who has the better title. This doctrine has been on several occasions recognized in this court. In *Greene v. Lister*, 8 Cranch, 229, 230; S. C., 3 Pet., 97, 107, the court said: The general rule is that if a man enters into lands, having title, his seizin is not bounded by his occupancy, but is held to be co-extensive with his title. But if a man enters without title, his seizin is confined to his possession by metes and bounds. Therefore the court said that, as between two patentees in possession claiming the same land under adverse titles, he who had the better legal title was to be deemed in seizin of all the land not included in the actual close of the other patentee. The same doctrine was held in *Barr v. Gratz*, 4 Wheat., 213, 223, where the court said that where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seizin of the estate who has the better title. Both cannot be seized, and therefore the seizin follows the title. And that where there

was an entry without title, the disseizin is limited to the actual occupancy of the party disseizing; and, in reference to the facts of that case, the court held that in a conflict of title and possession, the constructive actual seizin of all the land not in the actual adverse possession and occupancy of the other was in the party having the better title.

In the *Society for Propagating the Gospel v. The Town of Pawlet*, 4 Pet., 480, 504, 506 (§§ 611-18, *supra*), which came before the court upon a division of opinion upon a state of facts agreed, the court held that where a party entered as a mere trespasser without title, no ouster could be presumed in favor of such a naked possession; but that where a party entered under a title adverse to the plaintiffs, it was an ouster of or adverse possession to the true owner.

It appears to us, also, that the doctrines thus recognized by this court are in harmony with those established by the authority of other courts, and especially of the courts of Kentucky, in the cases cited at the bar. *Johnson's Digest*, Ejectment, V, b; *Big's Dig.*, Seizin and Disseizin in A, B, C, D.

It remains to apply these questions to the present exception. The court was called upon, in the first instruction, to declare that the possession of the defendants was no bar to the action. This obviously required the court to give an opinion upon matters of evidence proper for the consideration of the jury, and which might be fairly open to controversy before them. It was, therefore, properly denied. The second instruction required the court to declare that the statute of limitations could only protect the defendants to the extent that (they) had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of the suit. The difficulty upon this instruction is that no evidence was adduced, or, if adduced, it was not competent for the court to decide upon it, that either Pickett, the patentee, or the lessor of the plaintiff, at the time of the entry and ouster by the defendants, had any actual seizin or possession of any part of the land included in the patent, so as to limit their possession to the bounds of their actual inclosures or occupancy. The entry of the defendants was certainly under a claim of title under the patents of Gibson, and Sterrett, and Grant. If Pickett or his grantees were then in possession under his patent, the defendants, upon the principles already stated, would have been limited, as to their adverse possession, to the bounds of their actual occupancy. But that not being shown, the question resolves itself into this: Whether a party entering into land under a patent, but without showing a paper title to any particular portion of the land included in that patent, is not to be deemed as claiming to the abutments of the patent against adverse titles held by other parties not then in seizin or possession under their titles.

The opinion of the circuit court was (as the instruction given shows) "that adverse possession was a question of fact" (which might be true, as applicable to the case before it, though it is often a mixed question of law and of fact); "that under the adverse patents given in evidence, it was not necessary to show a paper title under those adverse grants to make out adverse possession, but that such hostile possessions might be proved by parol" (which, as a general proposition, is certainly true, as adverse possession may exist independent of title), and what is the material part of the instruction, "that an entry under one of the junior grants, given in evidence by the defendants, and within the boundaries of the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the

abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttal and boundaries under which the entry was made." The prayer of the plaintiffs, then, was or might have been rejected, because it assumed the decision of a question of fact; that is, that the defendants entered without any claim of title by metes and bounds, and the instruction given was that an entry under the junior grants, by one claiming under them by no other abuttals than those of the grants, was to be deemed an entry and adverse possession to the extent of those abuttals. This decision is fully supported by the cases in 2 Marsh. Kent. Rep., 18, and 1 Marsh. Kent. Rep., 376.

Looking, therefore, to the instruction in the qualified manner in which it is given, and with reference to the fact that no seizin was shown in Pickett or the lessors of the plaintiff in any part of the tract included in his patent, at the time of the entry of the defendants, it seems to us that, according to the local decisions, the refusal was right, and the instruction given was correct in point of law.

We think it proper to add that no notice has been taken of the fact that Clarke, the lessor of the plaintiff, was a non-resident; because it does not appear that any of the instructions were asked or given in reference to the legal effect of his non-residence. The judgment is therefore reversed for the errors stated in the first and second bills of exceptions, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

BALDWIN, J., dissented as to the possession.

LEA v. POLK COUNTY COPPER COMPANY.

(21 Howard, 493-506. 1858.)

APPEAL from U. S. Circuit Court, Eastern District of Tennessee.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—There stood on the record book an entry for eighty acres in the name of William P. Lea, No. 5,446, dated April 5, 1842. A patent issued, founded on this entry, dated 21st August, 1842, No. 5,744. This patent is in the name of William Park Lea. It was signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the state. As originally filled up, it was in the name of William P. Lea, and was altered to William Park Lea by adding the letters "ark" to the P. This was done by the register of the land office, whose duty it was to prepare the patent for the signatures of the governor and secretary; and the act of affixing the great seal to it, which gave it validity as against the state, divested her title, and vested it in the grantee on the patent thus executed being delivered to him.

William Park Lea and William Pinkney Lea wrote their names alike, William P. Lea; the latter always, and the former frequently, although he often signed his name William Park Lea. The register added the letters "ark" to the middle name, to distinguish between them, as both had entered lands in the entry taker's office, and confusion prevailed as to who was the proper owner. This is the effect of the register's evidence. In filling up grants Nos. 6,260, 6,258 and 5,764 they were made out in the name of William Park Lea; but the register scraped out the letters "ark," and issued the patents in the name of William P. Lea, because the lands had been entered by William Pinkney Lea.

No. 5,764 of these patents was filled up on the same day (21st August, 1842)

that the one (No. 5,744) here in dispute was filled up, and the letters "ark" added to the letter P; the other two (Nos. 6,260 and 6,258) were filled up December 8, 1842. Five other patents were filled up properly in the name of William P. Lea. This was all done in the latter six months of 1842, and the grants were founded on entries made in April of that year in the Ocoee land office. The respective claimants were related to each other, and familiarly known to the register. The entries had all been made and were recorded in the name "William P. Lea."

That this was honestly done by the register is not open to dispute. He has given a deposition in great detail, and accounts for his course of proceeding entirely to our satisfaction, so far as his integrity is concerned.

This patent (No. 5,744) the bill seeks to have reformed so as to stand in the name of William P. Lea, the complainant, and to be used in an action of ejectment pending in the court below by the complainant against the respondents; and, secondly, if said grant shall be found to have been issued to the person not entitled to the land, that then the court will divest the title of the respondents, and vest it in the complainant, so that he may use the decree on the trial of his action of ejectment.

1. The bill also prays that the court may remove impending clouds from the complainant's title by declaring all the alleged titles of the respondents, or either of them, void, and direct the possession of said lands to be surrendered to the complainant, together with a prayer for further and general relief.

To the relief sought, among other defenses (set up in their answers), the respondents rely on the fact that they claim under one John Davis, who purchased from William Park Lea, and took title by a deed in fee, with a general warranty of title for the land in dispute, and that Davis, their vendor, purchased and paid for the land to said William Park Lea, without any notice or knowledge that the complainant had any equity in the land, or set up claim thereto.

This deed is produced, dated June 18, 1846, and appears to have been duly executed by William Park Lea, and the consideration money was paid to him by John Davis. It is not pretended that John Davis had any notice of the complainant's claim when the deed was executed; the complainant had then no knowledge himself that he had any interest in the land.

One objection to this deed is that it was not duly proved, and could not be lawfully registered according to the laws of Tennessee. In the certificate of probate of Elias Davis, one of the subscribing witnesses, the clerk does not say the witness swore that the grantor acknowledged the same on the day it bears date. The other witness so proves. Now, as the deed shows the date, and the certificate of probate says the grantor acknowledged it for the purposes therein contained, the probate is covered by the provisions of the act of 1846 (ch. 78, Nicholson's Statute Laws, 242).

Caldwell, Keith & Mastin purchased from John Davis, in the year 1852, paid the purchase money (\$6,000), and took a deed in fee-simple, with a covenant of general warranty of title for the land in dispute; and they also rely on the plea that they were *bona fide* purchasers of the legal title, or what purported to be so; and this allegation is established by the proof, unless it be true that the letters "ark," crowded after the letter P, in William Park Lea's name, at the various places that this alteration is found in the patent, was sufficient to put the purchasers on inquiry. Now, if they had inquired of the register, he could only have told them that he put the letters there in the

course of his official duty, but when, he could not say, this being what he proves here. Then the presumption comes in, that, as a public officer, the register did his duty, and he, who impeaches the act as illegal must prove the allegation. On this assumption the register filled up the patent as it is now found, before the governor signed it, and the seal of state was attached — that is to say, when the patent bears date.

Then, again, all the incipient steps authorizing the register to issue the grant, the governor to sign it, and the secretary to attach the great seal, are presumed as having been regular; nor was the purchaser required to look behind the patent. *Bagnell v. Broderick*, 13 Pet., 448.

§ 787. *Innocent purchaser of legal title will be protected in equity.*

The bill of necessity admits that the *legal* title was vested in William Park Lea by the grant as it now stands; as, on any other assumption, the complainant would have his remedy at law, and must be turned out of court. The title has thus stood since 1842; important rights have grown up under it, with which a court of equity cannot interfere, on general principles of justice. 1 Story's Com. on Equity, sec. 64, ch. 64, *d.* We mean to say that if the equity conferred by the entry was in William Pinkney Lea, and the patent issued in the name of William Park Lea, and the mining company, or those under whom they claim, have innocently and ignorantly purchased and paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, then the complainant cannot be heard to set up his equity behind the grant to overthrow the purchase. 1 Story's Eq., 454. And so the respondents, the mining company, might buy in the legal title of William Park Lea *after* they had notice, if they were innocent purchasers, holding under John Davis, and Caldwell, Keith & Mastin. 1 Story, Eq., sec. 411.

§ 788. *Possession of land is notice of title.*

But it is insisted that the deed from Lea to Davis was not registered, and fraudulently concealed from the complainant, so that he could not proceed to assert his rights. Davis had possession of the land when he took William Park Lea's deed, claiming for himself, and adversely to all others; and he so continued in possession till he sold the land in December, 1852. This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain. *Landis v. Brant*, 10 How., 375.

Furthermore, Caldwell, Keith & Mastin purchased from Davis in December, 1852; they caused the deed from William Park Lea to Davis, and the one from the latter to them, to be duly registered, without having any knowledge of the complainant's claim, and without the existence of any circumstance to put them on inquiry respecting it. They were clearly *bona fide* purchasers of a legal title, that the complainant cannot assail in equity.

§ 789. *Unregistered deed is a title to which the bar of the statute of limitations will attach.*

2. The respondents rely on the act of limitations of the state of Tennessee as a protection to their title and possession. The act declares "that where any person shall have had seven years' possession of any lands which have been granted by this state, holding or claiming the same by virtue of a deed of conveyance or other assurance, purporting to convey an estate in fee-simple, and no claim by suit in law or equity, effectually prosecuted, shall have been set up or made to said lands within the aforesaid time, then, and in that case,

the person or persons, their heirs or assigns, so holding possession, shall be entitled to keep and hold possession of such quantity of land as shall be specified and described in his deed, etc., in preference to, and against all, and all manner of person or persons whatever."

By the settled construction of the foregoing act, an unregistered deed is a sufficient title on which the bar can be founded; and when John Davis' deed from William Park Lea was recorded, it related to its date, and was good to draw the better title to it by force of the statute.

§ 790. *Evidence examined and possession held to be adverse under statute of limitations.*

The possessions of John Davis, and Caldwell, Keith & Mastin, made one possession; and if the two were continuous for the whole term of seven years, then the bar was formed, and the defense complete. This brings us to the *fact* of actual possession held by Davis, for after he sold to Caldwell, Keith & Mastin, no one disputes their actual possession.

Davis purchased the improvements on the land from Wallace, 25th February, 1842, for the sum of \$40, and by the agreement Wallace was to hold under Davis and occupy the premises for three years, which Wallace proves he did. He then left the place, and Wilson Abercrombie went into possession under Davis, and occupied the cabin one year. It being in the midst of a small field which was annually cultivated in grain crops, Davis removed the cabin beyond the field, and put it up again on the forty-acre lot, and Abercrombie occupied it another year. He was succeeded by Bailey McCoy as tenant of the cabin under Davis; McCoy occupied it for a year or more. Wallace's field could not have included more than some three acres, and had an orchard of peach trees on it. After the cabin was removed, Davis enlarged the field, and extended it across the southern line of the forty-acre lot, and also enlarged it, from time to time, by small clearings at the other end (which were made for turnip patches), until the field included about twelve acres, and which was annually cultivated by Davis, whose residence was within a few hundred yards of the field, on the adjoining section of land. This field was obviously an important part of his plantation. That portion of the twelve-acre field lying on the forty-acre lot embraced, when this suit was brought, about five acres. Mann, the county surveyor, who run the lines of the forty-acre lot, in September, 1855, so states. He proves that the debris and ground plan of the cabin Wallace built and occupied were quite apparent; that the peach trees were there, and that the old and worn land was plainly distinguishable from that more recently cleared up, and which was on its different sides.

To overcome the evidence of continued possession on the part of Davis, two witnesses were produced by the complainant, to wit, Crawford Braswell and Jesse Shubird. The former swears that he resided in Ducktown from June, 1845, to October, 1850; that he knew John Davis and the place Wallace improved. "I, at one time (says he), proposed purchasing that eighty acres where the Wallace improvement was. Davis told me that he had only the occupant of Luther Wallace; that he did not own the land, and that he had moved the improvements off to another place; and, having asked him who owned the land, he stated it was entered by a man by the name of Lea. He stated he had moved off the house and fruit trees, and I think he also named the time." Says he thinks the conversation took place in July, 1848.

In answer to another question, the witness says: "Mr. Davis showed me where he had moved the house from, and I understood he had moved all the

improvements off that place, and the stock was running on the land that had been inclosed, and, if any of the fencing was left, I did not notice it. The place was grown up very much with bushes. There might have been some rotten rails scattered where the fence was put, laying among the bushes and saplings."

This is represented, also, as having taken place in July, 1848; and the witness swears that, in the succeeding August, Davis showed him where the Wallace house had stood. He was interrogated, on the part of the plaintiff, as follows:

Please state whether or not you afterwards heard John Davis set up claim to the Wallace eighty-acre tract; and if so, state when it was, and fully what he said to you on the subject.

Answer. In the winter of 1849 there was a man there from Bradley county, looking at Davis' land, and talking of buying him out. I happened at Davis' at the time, and he requested me not to mention the conversation to any person that had passed between us about the land; that if he sold his land to that man, he should sell the Wallace place also.

Question by same. Please state whether that was the first time you heard him assume to own the eighty-acre Wallace tract.

Answer. He did not profess to own it then, but said he should sell it with the balance, if he sold at all.

Interrogatory by same. State whether or not John Davis had the Luther Wallace place inclosed at any time; and if so, state when he had it done.

Answer. If he had it inclosed at any time, it was since I left that country. To the cross-interrogatories, the witness stated:

Do you say there was no land on the Wallace tract inclosed and in cultivation during the years 1848, 1849 and 1850?

Answer. None in 1848, and none afterwards that I know of.

Are you acquainted with the boundaries of the Wallace land, and can you say, positively, that there was no land on said tract in cultivation during the aforesaid years?

Answer. I was not acquainted with the lines of the tract, and if there was any in cultivation on the tract, I did not know it.

Can you, then, say positively that no part of the field, about where the old Wallace house stood, was in cultivation during the time mentioned?

Answer. No part of it was in cultivation during the time I lived there.

In your answer to complainant's sixth question, you say he (John Davis) stated that Lea had entered the land. State where that conversation took place, when, and, if any person was present, give the name or names.

Answer. This conversation took place at Davis' mill, in the month of July, 1848, and there was no person present.

In your answer to complainant's third question you say that John Davis told you he had only the occupant right, which he had purchased from Wallace, and that he did not own the land; state exactly what he told you, and at what time.

Answer. In the month of July, 1848, he made the statements I have made in that answer, that he had only bought the improvements from Wallace, and that he did not own the land, and would not sell it, and make a title to it.

Shubird swears that he went to Ducktown to reside in 1848, and lived there about three years; says he knew John Davis, and the Luther Wallace improvement.

The succeeding questions propounded for the complainant, and the answers to them, will best present the material statement of this witness:

State whether or not the Luther Wallace improvement was moved from the place where he first put it up; and if so, state who had it moved, and where it was moved to.

Answer. The houses, fencing and peach trees were moved from the place they were first put on the Luther Wallace place. They were moved by John Davis, and put on his own land.

How far were these improvements taken from where Luther Wallace had put them up?

Answer. I can't exactly say, but suppose a half mile or three-quarters.

Please state why John Davis removed these improvements. Tell all you may have heard John Davis say on that subject.

Answer. He (John Davis) stated to me that the reason he moved them was, that he was afraid he would lose his labor, as he had understood a man by the name of Lea had entered the land, and stated that he did not own the land.

State whether or not you ever heard John Davis claim the land where the Luther Wallace improvement was, at any time while you lived with him.

Answer. The Luther Wallace place is now called Copper Hill. I think in about the year 1849, after the copper property came into notice, John Davis set up a claim, and said it.

Do you know whether or not the Luther Wallace improvement or property was left vacant and turned out at the time Davis removed the fencing, etc., away? And, if so, state how long it was left vacant.

Answer. The property was left vacant — how long I can't say, but until Davis set up his claim; he then commenced fixing up the fencing again.

On cross-examination the witness states that he went to Ducktown in March, 1848; that the Wallace house had been removed before; nor was there any inclosed land on the Copper Hill tract when he went there.

He is then further interrogated, and answers:

How can you say, then, as in your answer to complainant's third interrogatory, that the house, fencing and peach trees were removed by John Davis, and put upon his own land?

Answer. I heard John Davis say so.

At what time did Davis tell you this, and how did he happen to speak to you on this subject?

Answer. Shortly after I went there — I can't say exactly what time — John Davis and myself, after passing through his farm, passed upon the vacant place of Luther Wallace. He mentioned the subject himself, and told what I have heretofore stated.

On which side of Davis' mill creek was the improvement of which you have been speaking situated?

Answer. It was situated on the left hand when going up the creek.

Was there not, at that time, a small field inclosed between the mill creek and the Copper Hill?

Answer. Not to my knowledge, as I don't know whether there was or not, as I know nothing about it, only as Davis told me that he had taken all off.

Was there any person present when this conversation occurred between you and Davis? If so, state who it was.

Answer. There was no person present.

If the evidence of these two witnesses be true, then there was no continuous adverse holding; and the question is, whether it is entitled to credit? Braswell swears that the entire improvements were removed, including the fruit trees; and that the land where the Wallace improvement had been made was grown up and overrun with bushes and saplings; that this was the condition of the place in 1848. Shubird proves the same, with the exception that he says nothing as respects the undergrowth. So far as conversations with John Davis are given, they may be dismissed with the remark that he had obtained William Park Lea's deed for the land in June, 1846, and was not at all likely to carefully disavow all title, and say the land belonged to one Lea.

In 1856, when these depositions were taken, John Davis was dead, and courts of justice lend a very unwilling ear to statements of what dead men had said.

Many witnesses have been examined to prove that Braswell and Shubird are not entitled to credit on oath as witnesses, and many prove the reverse. That they are men of no substantial worth, and of little respectability, is manifest enough, and confidence in their integrity is certainly impaired. But in this case, as in most others, the integrity of the witnesses is easily ascertained. If the land was grown up in bushes and saplings in 1848, it must have been thrown out as a waste place six or eight years before that time. Davis purchased Wallace's possession in February, 1842. Wallace remained there three years by agreement with Davis. Then Abercrombie came in, and occupied the house one year whilst it stood in the field. It was then removed beyond the field and had no connection with it. Davis himself took possession of the cleared land and cultivated it. It was rented by Davis to Dugger, either in 1849 or 1850, and he raised a crop on it. The orchard was there then, and continued there till 1855, after this suit was brought, as Mann, the county surveyor, proves, who traced the lines of the Copper Hill tract, and examined the cleared land in the twelve-acre field; and especially that part north of the southern line of the forty-acre lot. Mann states that the marks of the old house built by Wallace were plainly visible, and so was the old worn land cleared by Wallace, and that the peach trees were there. Substantially the same facts are proved by nearly all of the witnesses examined on part of the respondents. It is the most familiar fact in the cause. That the Wallace field and orchard were constantly under fence from the time Davis purchased of Wallace, and certainly never abandoned nor overrun with brushwood and saplings, is fully established. And our opinion is, that when Braswell and Shubird deposed to the reverse, they stated what was untrue. The complainant in his amended bill does not controvert the fact that adverse possession, for more than seven years, had been holden of the land in dispute, but relies on the following allegations to avoid the bar, to wit:

Your orator shows the defendants, in their answers on file, charge that the said John Davis and those claiming under him had seven years' peaceable, uninterrupted, adverse possession of the land in dispute, previously to the filing of the original bill, and previous to the suit at law; as to which facts no answer is asked herein from defendants; but if any such possession existed, your orator charges, and which charge your orator does require to be answered, that it was a fraudulent possession under a fraudulent grant and fraudulent deed, the registration of which was postponed until within about the last two years; that the possession of your orator's grant, first by the said William Park Lea, and then by the said John Davis, was fraudulently con-

cealed from him by them; that he never had any knowledge or information thereof until about the time stated in his original bill, and within the last twelve months; and that, as his cause of action was thus fraudulently concealed, the statute of limitations cannot apply.

These allegations are specially denied by the answer of the respondents, except as to the fact that the deed from William Park Lea to John Lewis was not registered, which is admitted. Of the other allegations there is no proof, and of course they are not in the case.

Whether Lea had title or not at the time he conveyed to Davis is altogether immaterial, as the Tennessee act of limitation intended to protect and confirm void deeds purporting to convey an estate in fee-simple, where seven years' adverse possession had been held under them. Nor was Davis bound to register his deed from Lea; between them, as grantor and grantee, it was valid without registration. Neither can the complainant be heard to say that he had no notice of the fact that Davis claimed title to the land. His possession and adverse holding was notice to the world, as will be seen by the case of *Landis v. Brant*, above cited. On the two grounds above stated, we order that the decree of the circuit court dismissing the bill be affirmed.

Dissent by MR. JUSTICE DANIEL.

In the case of *Lea v. The Coppermine Company*, it is my opinion that the company, as a corporation, could neither plead nor be impleaded in a court of the United States.

DOLTON v. CAIN.

(14 Wallace, 472-479. 1871.)

ERROR to U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—Action of ejectment brought in 1865. The Illinois statute of limitations, on which the defendant relied, is set forth in the opinion. The plaintiff proved the following chain of title: Patent from the United States to Stephenson in 1818. Deed from Stephenson to McGuire in 1820. Deed from the latter to Thiriart, in trust for Jacquemart, in 1823. Death of Thiriart and Jacquemart, the former in 1845 and the latter in 1848, and a conveyance to plaintiff in 1864 by the heirs of Thiriart and Jacquemart.

The defendant showed a power of attorney from Jacquemart and wife to Tillon and Cutting, authorizing the sale of any lands of theirs in Illinois, etc. The power was executed in 1847, containing a power of substitution, under which Cockle was substituted in 1847. Sale by Cockle to Cain in 1848. Defendant also proved that he had paid all the purchase money except \$66, which Cockle refused to receive on the ground of a rumor that Jacquemart was dead. Defendant also proved possession of the land from the time of his purchase.

Opinion by MR. JUSTICE DAVIS.

The limitation laws of Illinois relied on by the defendant, in substance, declare that whoever has resided on a tract of land for a period of seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the state or the United States, can plead the possession in bar of the suit.

§ 791. *Under the limitation laws of Illinois it is not necessary that the entire title be evidenced by acts of record.*

It is objected that the entire title of the defendant is not evidenced by acts of record, but this is not necessary. If the source or foundation of the title is

of record it is available to every person claiming a legal or equitable interest under it who can connect himself with it by such evidence as applies to the nature of the right set up. *Collins v. Smith*, 18 Ill., 163; *Poage v. Chinn*, 4 Dana, 4.

Is the right set up by Cain, then, within the purview of the statute? It is conceded to be, if the bond was executed under a valid power of attorney, coupled with full payment of the purchase money, and the obligor had the legal title to the land. This concession was necessary, because it is too plain for controversy that a union of these elements would constitute a complete equitable title, which a court of chancery, on the proper application, would perfect into a legal title. But there are other principles by which an equitable title can be tested, and, in their application to this case, relieve it of all difficulty. If a party has done all that could reasonably be expected of him to perform his part of the agreement, it will be considered, in equity, as having been done. Cain is within this condition. He purchased the land from Cockle, paid him all he agreed to pay, except the sum of \$66, and this he was ready and willing to pay, but Cockle would not receive it, on the plea that it was rumored that his principal was dead. Was not this offer equivalent to payment? What more, under the circumstances of this case, would a court of equity require? It would be a harsh rule to say that the purchaser should lose his land because he did not institute inquiry, in France, to ascertain whether the rumor of Jacquemart's death was well founded or not. There was no revocation of the power, and Cockle was the proper person to receive the money, unless Jacquemart were dead; and there is nothing in the record to show that Cain ever received any information on the subject, except what was contained in the reply of Cockle when he offered to pay him the money. Naturally a man in the predicament of Cain would rest in security until advised by Cockle that he could safely pay the money to him, or until some one having authority called upon him for payment. This was never done; and, after sixteen years' residence on the land, he is called upon to surrender it because he did not employ unusual means to ascertain the proper parties to whom the small balance due on the land should be paid. If there were no limitation law in Illinois applicable to this case, the action of ejectment would, on proper application, have been enjoined until Cain could, through a court of equity, have perfected his title so as to make it available as a legal defense in a court of law. If, then, Cain had such a title as a court of equity would recognize, and convert, by its decree, into a legal title, it must be considered a title in equity within the meaning of the statute. Indeed, it is difficult to conceive what the law does mean by a title in equity if this be not one. It must be something less than a legal title, else these words in the statute can have no effect. The law was designed to protect both kinds of title alike, and, unless equal influence is extended to both, there is a practical repeal of a portion of the statute. In no proper sense can it be said that Cain broke his agreement. It is true he did not formally tender the money to Cockle, but this would have been a useless act, as Cockle told him, on his application to pay, that he could not receive the money. Besides he had good right to suppose, from what had previously occurred, that the offer to pay Cockle was as valid as the offer to pay Jacquemart.

Why, then, has not Cain, having shown a record foundation, brought himself within the scope of the statute?

It is urged, as an additional reason against this, that Jacquemart did not

own the legal title, because one of the mesne conveyances made in 1823 was to Thiriart in trust for Jacquemart. This is true, but Thiriart died in 1845, and Jacquemart, the beneficial owner of the land, assumed to have the right to sell it in July, 1848, when he executed his letter of attorney to Tillon and Cutting, with power of substitution. Nothing is heard from the heirs of Thiriart for a period of nineteen years from the death of their ancestor, when, in 1864, they convey, as do also the heirs of Jacquemart, the tract of land in controversy to the plaintiff. After such a lapse of time, in the absence of any proof on the subject, it is difficult to resist the conclusion that some undue influence must have been used to procure these conveyances; but, be this as it may, the title of Cain is not less an equitable one on account of them, and if so, the statute will not allow his possession, rightfully obtained and continued the requisite length of time, to be disturbed. Without discussing the effect of the deed of Thiriart's heirs, in its application to this case, it is enough to say that a court of equity, looking through forms to the substance of things, would find a way to protect Cain's purchase.

It is urged, as an additional reason why this defense cannot prevail, that the bond is in the name of Jacquemart alone, while the power was to convey the joint property of husband and wife. There would be some force in this position if the original deed to Thiriart had been in trust for the wife as well as the husband; but, as this was not the case, the joinder of the wife could only have been intended to alienate any supposed right of dower in the event that she survived her husband. She had no present title to the land, either legal or equitable; and although Cockle was empowered to use her name, as well as her husband's, in any instrument of sale he might execute, the failure to do so cannot, in any event, operate to invalidate the bond for a deed which he gave to Cain.

It is hardly necessary to notice the objection that Jacquemart's name is incorrectly given in the contract of sale. Cockle testifies that this was a mistake, and it is the business of a court of equity to see that Cain is not harmed by it.

On the whole case we are of the opinion that the defendant is within the protection of the limitation laws of Illinois, which he invoked for his defense, and which he had a right to do for that purpose, although the title used to accomplish this object could not be employed by a plaintiff in an action of ejectment, who can only recover when he has the paramount legal title.

In conclusion it is proper to state that we have examined the decisions of the supreme court of Illinois, to which we have been referred as affecting the question at issue, and do not find anything decided which militates against the views we have presented.

Judgment affirmed.

GREGG v. SAYRE.

(8 Peters, 244-254. 1834.)

ERROR to U. S. District Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—An action of ejectment was originally commenced between the above parties in the district court, which possesses circuit court powers, for the western district of Pennsylvania, and a judgment was obtained by Sayre and wife to recover possession of certain lots of lands within

the original manor of Pittsburgh. To reverse this judgment a writ of error was prosecuted, which brings the case before this court.

On the trial in the district court a bill of exceptions was taken, out of which arise certain points that are now to be considered and decided. The bill of exceptions reads, in part, as follows: "And the counsel for the plaintiffs, to maintain and prove the issue, gave in evidence, among other matters, a deed from John Penn, Jun., and John Penn, to Nathaniel Bedford, dated the 31st day of May, 1786, for sixty-two acres of land on the Monongahela river, in the manor of Pittsburgh, being acknowledged on the 1st day of June, 1786, in the city of Philadelphia, and duly recorded, etc.; also an assignment, indorsed upon said deed, of all the right, title, claim and interest of the said Nathaniel Bedford to the premises, to Mrs. Jane Ormsby, dated the 1st day of June, 1786, and duly acknowledged, etc.; also a certificate of the recorder of the county of Washington, dated the 15th of October, 1831, that there is no record of the transfer of the title to the premises aforesaid, by said N. Bedford, to Mrs. Jane Ormsby, in the office of Washington county." It was then admitted by the attorneys for the parties that the children of John and Jane Ormsby were: "Mrs. Bedford, who died on the 8th of July, 1790, without issue; John Ormsby, Jun., who died in August, 1795; Joseph B. Ormsby, who died on the 20th of December, 1803; Oliver Ormsby, who died in the year 1832; and the present defendant, Mrs. Sidney Gregg, who is the only survivor, and, under the providence of God, a lunatic."

It was further admitted that Mrs. Jane Ormsby, the wife of John Ormsby, died intestate on the 13th day of June, 1799, and that her husband, John Ormsby, died on the 19th day of December, 1805. The possession of Mrs. Gregg of the twenty-five acres and of the eight acres and one hundred and twenty-two perches, the upper part of the sixty-two acre tract, was then admitted by the counsel for the defendants. The plaintiffs further offered in evidence a petition to the orphans' court of the county of Allegheny, signed by O. Ormsby and N. B. Craig, the committee of Mrs. Sidney Gregg, and filed in November term, 1828.

Among other evidence the counsel for the defendants proved, by the testimony of John Hutchinson, that he had known the family of Mr. Ormsby for forty years and lived as a tenant under the old gentleman and his son, Oliver Ormsby, about thirty-five years, and sometimes in their families before old John Ormsby's death. Isaac Gregg, his son-in-law, as early as 1799 employed hands to clear out the piece of property where the ferry-house now stands; the part next the hill being cleared and the part next the river being in woods. That the said Gregg employed his brother and himself, who cut off the timber into cord wood; that Mr. Gregg was cautious in showing them the lines marked by a post on the bank and a butternut tree, blazed, four or five rods above the run that falls into the river, that we should not cut the timber below it, as the land belonged to Mr. Ormsby; that in the year 1800, Mr. Gregg employed them to go up the hill and to cut timber to build a house and four fences; and in the autumn of 1800, the house was put up by them, and that he paid them \$75 or \$80 for doing it.

"Mr. Gregg put Alexander Gibson as a tenant in the house, who occupied it that fall and the succeeding winter, and made an agreement with Mr. Gregg to rent it for several years, but afterwards abandoned it."

"Samuel Emmett went into the house in the spring of 1801, and occupied it for a great number of years. George Kintzer was in it for many years

after Emmett. Andrew Rearick was there; and Young lived in it for a year; George Bonners for six months; Jacob Drake for three years. These tenants were all put in by Isaac Gregg and his family. Witness also stated that he recollected that Isaac Gregg got another lot adjoining the twenty-five acre lot, and between it and the bridge, about twenty-nine years ago. Mr. Gregg was to allow John Tate, his tenant, out of the rent for putting up a barn, and witness assisted him, etc. On the twenty-five acre lot there was the ferry-house, a stable and a large shed; these improvements were all made by Mr. Gregg. The fences were put round the upper lot in 1800; the lower lot was fenced long before. The fences since that time have been kept up, and the witness never understood that any one, except Mr. Gregg, had any claim to the lots. Witness refers to the two lots in controversy."

"James Ross, Esq., testified, among other things, that he was acquainted with John Ormsby's family in 1782. In 1784 Colonel Woods, as the agent of the Penns, surveyed the sixty-two acres in controversy, and noted in his draft that the tract was platted for John Ormsby. After the reservation of this lot from Mr. Ormsby the manor was subdivided. Mr. Woods and Mr. Brackenridge, who was the counsel for Mr. Ormsby, recommended that the deed should be taken out in the name of Mrs. Ormsby; and Doctor Bedford, her son-in-law, proceeded to Philadelphia for that purpose and brought back the title; the consideration money had probably been accumulated by Mrs. Ormsby. Isaac Gregg was in possession of the property before the dates of the deeds to him. In 1802 Mr. Gregg had the ferry, and he and his tenants have held possession ever since.

"Other witnesses were examined, who corroborated the facts already stated. Defendants also produced and read in evidence two deeds, the first from John Ormsby, Jr., to Isaac and Sidney Gregg, dated the 24th day of November, 1804, which had been duly acknowledged and recorded, for twenty-five acres of the land in dispute; and also a deed from the same to Sidney Gregg, dated the 13th of April, 1805, for eight acres and one hundred and twenty-two perches. Several leases of the tenants of Isaac Gregg and his family were read, and proof was made of the payment of taxes on the lots. The defendants also read in evidence the will of Joseph B. Ormsby and reference was made to an action of partition, instituted by the plaintiffs against the defendants, in which a judgment had been rendered in favor of defendants; to reverse which judgment a writ of error was brought and was still pending in the supreme court of Pennsylvania."

The plaintiffs' counsel then proved, by the testimony of Samuel Pettigrew, Esq., that he was one of the viewers appointed by the orphans' court, under the petition of the 23d of December, 1832, before referred to; that the viewers went on the ground and allotted a portion of the upper part of the tract to Mrs. Gregg and the lower part to Mrs. Ormsby.

The counsel for the defendants then offered to prove, by the testimony of H. M. Watts, who was attorney for Mr. Ormsby, and presented the petition above referred to, that it was done at the instance of Mr. Ormsby, for the purpose of establishing his title to the lower part of the tract; that at the time said petition was signed, it was done reluctantly by Mr. N. B. Craig, as the committee of Mrs. Gregg, and understood that Mrs. Gregg had heretofore claimed the portion of the tract she occupied in severalty, and that the said petition, and the decree of the court upon it, were not to affect her right. Which testimony, on being objected to, was overruled by the court.

The evidence being closed, the counsel for the defendants prayed the court to instruct the jury on the following points:

1. To entitle the plaintiffs to recover, on the ground that Mrs. Sayre is a child and heir of John Ormsby, they must prove that there was an actual marriage between him and her mother.

2. That the statute of limitations does apply to tenants in common; and if the jury shall believe that the land in question belonged to Jane Ormsby, and descended to Mary Sayre and the other heirs, yet the statute of limitations would be a bar to plaintiffs' recovery, if there was an actual adverse and continuous possession in the defendant, and those under whom she claims, for twenty-one years.

3. That if the jury shall believe the testimony of James Ross, John Hutchinson and George Kintzer, the facts sworn to by them establish that kind of actual, continuous and adverse possession acknowledged by the courts as coming up to, and fully within, the statute of limitations. Several other points were made in the special prayer for instructions, but it is not important now to advert to them.

The court instructed the jury, in substance, that the deeds from John Ormsby to the defendants, dated in the years 1804 and 1805, and which purported to convey the fee-simple, in consideration of natural love and affection, did not transfer the fee, as Ormsby only had a life estate in the premises. "That the deed of the husband cannot pass his wife's lands, and no possession of the lands by the grantee, under the grant, can create a presumption of title or become adverse to the true owner. An act or deed which is void cannot be the foundation of an adverse possession, for it can give no color of title; and a void title is not such a conveyance as that a possession under it will be protected, under the statute of limitations. The conveyance of N. Bedford to Jane Ormsby was indorsed on the deed from the Penns to N. Bedford; and the conveyance by John Ormsby to Isaac and Sidney Gregg recites the conveyance to Bedford. It must therefore be presumed that John Ormsby had possession of the deed from the Penns to N. Bedford, and that he at least was conusant of the title of the heirs of Jane Ormsby. The deeds to Isaac Gregg and to Sidney Gregg set forth a conveyance from N. Bedford to John Ormsby; such a conveyance, however, was never made; and while that is admitted, the recital is attempted to be justified on other grounds. It is clear that the deed from N. Bedford to Jane Ormsby was withheld from the record by John Ormsby; and there is evidence enough to infer that it was suppressed by him, for, being in possession of the deed, he had power to direct it to be recorded. His omission to do so, his false recital of a deed to himself from N. Bedford for the same land, and his concealment of the existence of any conveyance to Jane Ormsby, leave no doubt of his intention to suppress that conveyance. This conduct was fraudulent on the part of John Ormsby; and it is not material whether Isaac Gregg and Sidney Gregg were parties to it or not, since no estate can be acquired by a fraudulent grant; covinous conveyance of land is as no conveyance, as against the interest intended to be defrauded. And it must follow that no act or deed which is fraudulent can be the foundation of an adverse possession; because, being absolutely void, and not merely voidable, it cannot afford color of title, and without color of title there is nothing by which an adverse possession can be obtained; and for this reason. The statute of limitations does not extend to cases of fraud, and only begins to run from the time the fraud becomes known to the person then

having the title. That all purchasers for a valuable consideration are affected with constructive notice of all that is apparent upon the face of the title-deeds under which they claim.

“The right of Sidney Gregg, as one of the heirs of John Ormsby, if any she has as such, to the actual possession of the land, accrued after the death of John Ormsby, Jr. She may have then entered as one of the heirs of Jane Ormsby; and since that time, to the time of bringing this suit, has held, as she alleges, adversely to her co-tenants in common, and relies upon the statute of limitations to protect her in her claim. A possession to prevent a recovery, or vest a right, under the statute of limitations, must be actual, continued, adverse and exclusive; and it is a settled principle that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession, in subordination to the title of the true owner; and whenever an adverse possession is relied on, there should be some proof of actual ouster. The possession of one tenant in common is *prima facie* the possession of his companion; and the possession of the one can never be considered as adverse to the title of the other, unless it be attended with circumstances demonstrative of an adverse intent. And if one tenant in common enters generally, without saying for whom, it will be implied that he enters according to law; that is, for himself and the other tenant or tenants. To rebut this presumption of the law an actual ouster must be proved; which, however, may be inferred from circumstances, of which the jury are to judge. They may presume an actual ouster where one tenant in common enters on the whole, takes the profits and claims the whole exclusively for twenty-one years. Under such circumstances his possession becomes adverse, and the act of limitations begins to run. But a bare perception of profits by one tenant in common is not an ouster of his co-tenant. The statute will not run where one holds as tenant in common during the minority of his co-tenant. That one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession. What facts constitute an ouster and what adverse possession must be determined by a jury. The party against whom the adverse possession is claimed cannot be concluded by it if he labor under any of the disabilities pointed out in the statute; or where his co-tenant, claiming adversely, has been guilty of fraud by concealing or suppressing the title.

“If Isaac Gregg entered upon the land adversely, fenced and occupied it exclusively, and that occupation has been uninterruptedly continued for twenty-one years, it would be available as a bar, although Isaac Gregg may have entered as a trespasser; but the acceptance of the deeds from John Ormsby in 1804 and 1805, although these deeds were void as to the inheritance, must lead to the conclusion that he held under John Ormsby, Sen. The petition to the orphans’ court for a partition of the land, in December, 1828, supports this view of the case, and both acts show a disaffirmance of the title by settlement and improvement, if any existed.” The residue of the charge affirms principles, some of which are not controverted, and it need not be noticed.

This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience. The principal

question in this case, and, indeed, the only one of much importance, arises under the statute of limitations. By this statute an adverse possession of twenty-one years, under a claim of title, will bar a recovery, though the occupant have no title.

Possession of the lots in controversy was taken by the defendants, in the court below, and is still continued, but the court instructed the jury that the acceptance of the deeds by Gregg and wife, from John Ormsby, Sen., in the years 1804 and 1805, was an abandonment of their prior claim by occupancy, and that they must be considered as holding under those deeds.

If it were necessary to a decision of this controversy, the correctness of this instruction might well be questioned. Ormsby had a life-estate in the property, and it is not seen how the grantees of this estate abandon their title in fee, or any other claim beyond that of a life-estate, which they might have to the premises. But, as the decision of the case must turn upon another point, it is not necessary to examine this one.

It is true, as stated in the charge, that the husband cannot convey his wife's land so as to bind the inheritance. That as he holds only an estate for life in such land, he can convey no greater interest. But were the circumstances under which the deeds of 1804 and 1805 by John Ormsby to Gregg and wife such as to make those deeds fraudulent and wholly inoperative under the statute of limitations? And was it immaterial whether Gregg and wife participated in this fraud of Ormsby, or had any knowledge of it, as expressly charged by the court?

It is an admitted principle that a court of law has concurrent jurisdiction with a court of chancery in cases of fraud. But when matters alleged to be fraudulent are investigated in a court of law it is the province of a jury to find the facts and determine their character, under the instruction of the court. Ormsby, in the opinion of the district court, was guilty of fraud in not having the deed from N. Bedford to Jane Ormsby recorded, in reciting in his deeds to Gregg and wife, in 1804 and 1805, that a conveyance had been made to him by Bedford, when he knew that it had been made to Jane Ormsby, his wife.

It would be difficult to assign any fraudulent motive to Ormsby in either of the acts stated. The deed to his wife from Bedford was valid, though it was not recorded; and that he did not withhold it from the record with any view to his personal advantage is evident from the fact of his having conveyed the property, in consideration of natural affection, to the only surviving child of himself and the grantee.

In making these conveyances, on whom did he design to practice a fraud? Not on the grantees, for he received no other consideration from them than the impulse of fraternal attachment. Not on creditors, for it does not appear that they have been prejudiced. Did he design to defraud his granddaughter, who prosecuted the action of ejectment in the district court? There is no foundation in the facts and circumstances of the case for such an imputation.

Does the recital in these deeds, that Bedford had conveyed to Ormsby, afford evidence of fraud? This recital may have been made, and, indeed, it would seem, under the circumstances was, most probably, made through a mistake of the law. Bedford had conveyed to his wife, Jane Ormsby, and he might suppose that a *feine covert* could not take an estate in fee, and that the conveyance inured to his benefit. It appears, from the arguments of counsel, that this question was not considered entirely free from difficulty, under the laws of Pennsylvania, among some of the learned profession at that early day.

§ 792. *Fraud not to be presumed.*

Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud, where it has more likely been done through a good than a bad motive, fraud should never be presumed. But it is not necessary to decide whether these conveyances were fraudulently made by Ormsby or not. The important point is, to know whether Gregg and wife had any knowledge of the fraud, if committed, or participated in it. This knowledge, the court charged the jury, was immaterial: as the fraud of Ormsby rendered the deeds void, and, consequently, they could give no color of title to an adverse possession.

This instruction is clearly erroneous. If Ormsby be justly chargeable with fraud, yet if Gregg and wife did not participate in it; if, when they received their deeds, they had no knowledge of it, there can be no doubt that the deeds do give color of title under the statute of limitations. Upon their face, the deeds purport to convey a title in fee; and having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises.

§ 793. *The statute of limitations runs in favor of an innocent grantee in possession to whom a fraudulent conveyance of the fee has been made.*

Ormsby could convey no greater interest in the land than he possessed; but there is no evidence to show that the grantees in this case knew that his estate was limited, or that, in accepting the deeds, holding possession of the property, and improving it, they did not act in good faith. The possession which they hold under these deeds was adverse to Sayre and wife, and all other persons. The titles were for the whole property, and in fee; consequently, there can be no presumption that the possession was held as co-tenants with the plaintiffs in the court below. Both the possession and the titles were exclusive; and they were, consequently, adverse to all other claimants.

The eighth section of the statute fixes the limitation of twenty-one years as taking away the right of entry; and in the ninth section it is provided, "that if any person or persons having such right or title be, or shall be at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, etc., within ten years next after attaining full age," etc.

Mary Sayre, the defendant in error, was born in 1791, and she was twenty-one years of age in 1812. Her father having previously died, an interest in the property descended to her, on the decease of her grandmother, Jane Ormsby, in 1799.

The second deed, from Ormsby to Sidney Gregg, was made on the 13th of April, 1805, the first one having been executed the year before. On the 13th of April, 1826, the twenty-one years prescribed by statute expired, and the bar was complete at that time, if the possession had been uninterrupted, as more than ten years had run from the time Mary Sayre became of full age. The suit in the district court was not commenced until May, 1830.

As this point decides the case, it is not necessary to examine other parts of the charge to the jury. For the reasons assigned, the judgment of the district court must be reversed.

PILES v. BOULDIN.

(11 Wheaton, 325-332. 1836.)

Opinion by MR. JUSTICE DUVALL.

STATEMENT OF FACTS.—This cause is brought up, by writ of error, from the judgment of the circuit court for the district of West Tennessee. The lessee of Bouldin and others, who were plaintiffs in the court below, brought an ejectment against Conrad Piles and others for a tract of land containing two thousand five hundred acres, lying in Overton county, on Wolf river, granted by the state of North Carolina, by patent dated July 10, 1788, to Thomas and Robert King, who, by deed bearing date 25th of March, 1793, for a valuable consideration, conveyed the same to David Ross, of Virginia. Ross, by his last will and testament, duly proved and recorded, devised the same to his four children, namely, Eliza Myers, wife of Jacob Myers, Amanda A. Duffield, wife of John Duffield, Frederick A. Ross and David Ross, Jr., the lessors of the plaintiff, as tenants in common in fee.

The defendant Piles rested his defense on the location of several grants which were offered in evidence on the trial: 1. A grant dated 24th of December, 1798, founded on a warrant dated 10th of March, 1780, by the state of North Carolina to Henry Rowan, for a tract containing three hundred and twenty acres, called Walnut Grove, lying in Hawkins county, on Spring creek. 2. A grant bearing the same date, and founded on the same warrant, by the state of North Carolina, to Henry Rowan, for another tract containing three hundred and twenty acres, adjoining Walnut Grove, and having the same beginning. This tract was conveyed by deed, dated 22d of September, 1800, for a valuable consideration, to Conrad Piles, and is described to include a cabin known by the name of Livingston's cabin. 3. A grant bearing date on the 15th of August, 1808, to Conrad Piles, by the state of Tennessee, for a tract lying in Overton county, on Rotton's fork of Wolf river, containing two hundred acres; and, 4. Another tract adjoining the former, containing the like quantity, granted by patent of the same date to Conrad Piles. Piles possessed both the tracts granted to Rowan; one by purchase, the other by a parol lease for years. All these tracts are located on the plat exhibited on the trial, and none of the locations were contested. The title of the plaintiffs is admitted to be regularly deduced from the first patentee.

The defendants read in evidence the two grants before mentioned from the state of North Carolina to Henry Rowan for three hundred and twenty acres each; the first is described as lying in Hawkins county, "beginning on two hickories, an ash and a Spanish oak, on the north side of Spring creek; running north fifty poles to a stake; west three hundred and thirty-five poles to a stake; south one hundred and sixty-seven poles to a stake crossing Spring creek; east three hundred and thirty-five poles to a stake, and thence to the beginning." The second tract has the same beginning, calls "to adjoin the first, running east three hundred and thirty-five poles to a stake; north one hundred and sixty-seven poles to a stake; west three hundred and thirty-five poles to a stake; then to a beginning." Also two grants from the state of Tennessee to himself for two hundred acres each, dated 15th of August, 1808. These grants interfere with the plaintiff's grant of two thousand five hundred acres, and cover all the land of which the defendant was in possession within the bounds of the plaintiff's grant at the commencement of the suit, namely, the 17th of October, 1817. Nearly one-half of Rowan's tract, called Walnut

Grove, is included within the tract for which the ejectment is brought; the settlement called Livingston's Cabin lies principally in that part of Walnut Grove, thus running foul of the tract owned by the lessors of the plaintiff. Helm's improvement is contained partly in Walnut Grove, and within one of the tracts of two hundred acres granted to Piles, which is included almost wholly in the tract of the lessors of the plaintiff, and includes both Livingston's Cabin and Helm's Settlement. Piles has made another settlement included in the tract called Walnut Grove, a part of which is contained within the lines of the tract for which the ejectment is brought.

The defendant Piles proved that the grants before mentioned, to Rowan and himself, covered all the lands of which he was possessed within the grant of the plaintiffs; he also proved that the grant of Walnut Grove to Rowan included Livingston's Cabin as represented on the plat, and that he had been in the peaceable possession thereof for more than eight years before the commencement of this suit; and that he had also been in possession of a piece of ground within one of the grants to himself, and which is also within the plaintiff's grant, and which he had held and cultivated more than eight years before the commencement of this suit, and relied on the statute of limitations. It was also proved that Rowan in 1806 had made a parol lease of the tract called Walnut Grove to one Helm for six years, in consideration of certain improvements; that Helm took possession, built a cabin and cleared a few acres of land; that in the fall of 1807 Piles bought his lease, and agreed to make the further improvements stipulated and return the possession to Rowan; that he took possession immediately, and continued in possession, claiming for himself, and not as tenant for Rowan, though he did not mention his claim until after he had bought Helm's lease.

Under these circumstances the defendant Piles, by his counsel, moved the court to instruct the jury that if the deed from Rowan to Piles contained in its first part a sufficiently certain description, according to the evidence, of the land included in Rowan's first grant, that then they should disregard any subsequent description therein which should be repugnant to said first description. And also to charge the jury that if the deed from Rowan to the defendant did not cover the said land, yet that if they believed the defendant went into possession of the land contained in the said first grant to Rowan, under the lease from Rowan to Helm, as stated in the evidence, the defendant could defend himself in this action of ejectment, as tenant of Rowan, without making his landlord a defendant; that, as between Rowan and the defendant, he, the defendant, could not change the nature of his possession, but that the same would operate for Rowan's benefit to perfect his title under the statute of limitations, as against the plaintiff, and persons claiming under adversary grants; and that if the defendant's possession had perfected Rowan's title and made it a better title than the plaintiff's, then, the defendant having shown a better outstanding title, the plaintiff would not be entitled to recover. Which instructions the court refused to give, but instructed the jury that Piles could not avail himself of the statute, and that his deed from Rowan, by legal construction, did not cover the land included in Rowan's first grant. From this opinion of the court an exception was taken, and the cause is now before this court for revision.

The counsel for the plaintiffs in error insists that the circuit court erred on both points.

§ 794. *To decide upon the force and legal effect of a sealed instrument is the province of the court.*

The two grants to Rowan begin at the same place, have the same form and dimensions, and contain the same quantity of land. The deed from Rowan to Piles adopts the courses and distances of the second grant precisely, and proceeds to describe it as including the cabin commonly called Livingston's Cabin; but Livingston's Cabin is included in the first grant, called Walnut Grove. The counsel for the plaintiffs in error contends that if the first grant is not conveyed by the deed, it is, at least, doubtful which of the two tracts was intended to be conveyed; and that, therefore, it was a question of location to be settled by the jury, not a question of law to be decided by the court. But this court is of a different opinion. Admitting the universality of the maxim *de jure respondent judices, de facto juratores*, it will not be denied that it is the province of the court to decide upon the force and legal effect of a sealed instrument. The deed conveys, by metes and bounds, the land contained in the second grant to Rowan, corresponding precisely, in courses and distances, from the beginning to the given line inclusive, and will not admit of the construction that the first tract, called Walnut Grove, was conveyed merely because it includes Livingston's Cabin. The description in the deed was full and complete without reference to Livingston's Cabin, the mention of which appears evidently to be a mistake, from inattention in the writer of the deed, and conveyed no right or interest whatever in the first grant. And it is conclusive in the construction of this deed that it could not have been the intention of either party that the tract called Walnut Grove was intended to be conveyed, that it calls to begin "on the corner of the Walnut Grove tract." There is no error in the judgment of the circuit court in refusing to instruct the jury according to the first prayer of the counsel for the defendant.

The second question arises upon the plea of the statute of limitations.

§ 795. *Under the statute of limitations of Tennessee of 1797, chapter 43, peaceable possession of land for seven years under a grant, or conveyance founded upon a grant, vests the complete title in the person in possession.*

By the fourth section of the act of the state of Tennessee, passed in the year 1797, chapter 43, peaceable possession for seven years, by any person, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession, and all persons who neglect for that period to prosecute their claims are declared to be forever barred. There is the usual saving to infants, etc. In this case the record affords abundant proof, which is uncontradicted, that Piles had peaceable and uninterrupted possession of all the settlements made by him, comprehended within the lines of the plaintiff's grant, and claimed to hold the same as his own, adverse to the claims of all persons whatever. The settlement called Livingston's Cabin, and that made by Helm and transferred by Helm to Piles, are included in his own grant for two hundred acres, dated August 15, 1808, and also within the plaintiff's grant, and principally within that part of Rowan's first grant which interferes with that of the plaintiffs. His third possession is contained within Rowan's first grant, which interferes with the plaintiff's grant as has already been stated. All these possessions, being founded on grants, are protected by the act of limitations, the provisions of which are too plain to be misunderstood.

On this point the opinion of the circuit court is reversed and a *venire facias de novo* awarded.

DAVILA v. MUMFORD.

(24 Howard, 214-224. 1860.)

ERROR to U. S. District Court, Western District of Texas.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the district court of the United States for the western district of Texas. The suit was brought against the defendants and others to recover the possession of eleven square leagues of land, situate in what was formerly known as the county of Milam, on the right bank of the river San Andres, otherwise called Little river, where Buffalo creek and Donaho's creek enter said river, with specified boundaries.

The plaintiff gave in evidence a grant from the government of Coahuila and Texas, within the limits of the colony of the empresarios, Austin and Williams, dated 18th October, 1833, and rested. The defendants gave in evidence grants from the same government of a league each, situate within the boundaries of the eleven leagues, the one to David Mumford, dated 20th March, 1835, the other to Jesse Mumford, dated 25th February, the same year; the former went into possession in the spring of 1844, and continued in the possession and cultivation of the tract down to the time of trial; the latter took possession in the year 1850, and continued the cultivation and improvement down to the trial. The defense relied on is the statute of limitations.

The court charged that the plaintiff and defendants both claimed under titles emanating from the sovereignty of the soil; that the plaintiff's was the elder in point of date, and must be regarded as paramount, unless the defendants were protected by the statute of limitations set up in defense. That if the jury believed from the evidence the defendants had held actual adverse and peaceable possession, in their own right, for more than three years next before the commencement of the suit, under color of title, and that the plaintiff's cause of action accrued more than three years prior to the suit, the jury should find for the defendants.

The court further charged, that if the jury believed from the evidence that the defendants had held actual adverse and peaceable possession in their own right, cultivating, using and enjoying the lands, and paying taxes thereon, and claiming under a deed or deeds duly recorded, for more than five years next before the commencement of the suit, they should find for the defendants.

§ 796. *Statute of limitations of Texas construed.*

The fifteenth section of the act of limitations of Texas provides "that every suit to be instituted to recover real estate as against him, her or them in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" and provides that "by the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfers down to him, her or them in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty."

The principal ground taken against the operation and effect of the three years' limitation in the present cause is, that the elder title being on record, the defendants had constructive notice of the same at the time of the grants to

them, and hence that the title is subject to the charge of the "want of intrinsic fairness and honesty" within the meaning of the statute, which it is claimed removes the bar of three years' adverse possession.

§ 797. "*Want of intrinsic fairness and honesty*" relates to some defect of title, not to notice of adverse title.

It is admitted that this clause of the statute has not yet received a construction by the courts of Texas, and there is certainly some difficulty in ascertaining the precise meaning intended by the legislature from the phraseology used. The better opinion, we think, is, that the want of intrinsic fairness and honesty, in the connection in which the words are found, relates to some infirmity in the muniments of title or deduction of title of the defendant, indicating a want of good faith in obtaining it.

The statute, in defining what is intended by possession "under title, and color of title," in order to operate as a bar within the three years, declares that by the term "title" "is meant a regular chain of transfer from or under the sovereignty of the soil," which, as is apparent, is the case before us, the title of the defendants being directly from the government; and "color of title" is declared to be "a consecutive chain of such transfer down to him, her or them in possession, *without being regular*, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty;" clearly referring, as we think again, to the muniments of the title and defects therein.

To refer these words to a constructive or actual notice of an elder title would, in the practical effect of the limitation, be a virtual repeal of the statute, especially in all cases in which the elder title is of record.

A statute of limitations is founded upon the idea of an elder and better title outstanding, and prescribes a period of possession and cultivation of the land, under the junior or inferior title, as a bar to the elder, for the repose of society; thereby settling the title by lapse of time and preventing litigation.

As it respects the five years' limitation, the objection is that the grants were not duly registered, and hence the possession not within the sixteenth section of the act. The grant to David Mumford was registered on the 21st of July, 1838, and that to Jesse on the 4th of October of the same year. It is insisted, however, that the registries were a nullity, on the ground that the execution of the grants had not been properly proved or acknowledged, in order to be admitted of record.

In the case of the grant to David, the recorder certifies that the deed was presented to him, proven and duly recorded in his office the day above mentioned; and in that of Jesse, that the deed was proved for record by J. B. Chance, who made oath that he was familiar with the handwriting of the commissioner, W. H. Steele, and also of the assisting witnesses, and that he believed the several signatures to be genuine.

There is some difficulty in determining, from the various decisions of the courts of Texas upon the registry act of 1836, whether or not the certificates of proof of the grants in the present case were sufficient to permit them to registry at the time they were filed for record. It is claimed for the defendants that the recording of the grants was confirmed by the act of 1839, which provided that "copies of all deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the

county where such land lies." This act relates to the colonists' titles delivered to the grantee, the originals remaining as public archives. The deeds in the present case are copies of the originals remaining in the archives, and are certified by Steele, the commissioner, that they agree with the original titles which exist in the archives, from which they are taken for the parties interested, the day of their date, in the form provided by the law. In addition to this certificate, the copies, which it seems are executed by the commissioner and are second originals, were proved before the recorder at the time they were admitted to registry. But, be this as it may, we are not disposed to look very critically into the question of the registry, though we cannot say the court was in error in respect to it, inasmuch as the defense was complete under the statute of three years' limitation, as already explained.

An objection has been taken that the grants of the defendants are a nullity, upon the ground that Steele, the commissioner, had no authority to act in that capacity in the colony of Nashville, or Robertson, at their date. But this defect was cured by the act of the republic of Texas in 1841, as has been repeatedly held by the courts of Texas. 2 Tex., 1 and 37; 9 id., 348, 372; 23 id., 113 and 234; 22 id., 161 and 21; id., 722; 20 How., 270. The judgment of the court below affirmed.

MOORE v. BROWN.

(11 Howard, 414-436. 1850.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Illinois.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—Upon the trial of the cause, after the plaintiff had introduced his testimony and rested his case upon it, the defendants, in order to bring themselves within the limitation act of Illinois, passed in 1835, offered in evidence, as the foundation of their title, a deed from the auditor of public accounts of the state of Illinois. It purports to have been executed by virtue of a sale made on the 9th day of December, 1823, for the non-payment of taxes under the revenue act of February, 1823. The plaintiff's counsel objected to the introduction of the paper, and the court were divided in opinion as to its admissibility.

The act just mentioned requires the owners of lands to pay their taxes into the state treasury on or before the 1st day of October. The seventh section declares, if they shall fail to do so, "it shall be the duty of the auditor to make a transcript from the books of all such delinquents, charging the tax with an interest at the rate of six per centum until paid, and all costs which may accrue," and that the auditor shall "cause the same to be advertised in the paper printed at the seat of government, or in some other paper printed in the state, for three weeks, giving notice of the day of sale, the last of which publications shall be at least two months before the day of sale, and the auditor shall proceed to sell, on the day fixed in such advertisement, the whole or so much of each tract as will pay the tax, interest, and costs."

The second section of the act of limitation is as follows: "Every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of the state to sell such land for

the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land upon execution, or any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid." R. S. 1845, p. 349.

§ 798. *A deed conveying a tax title which is void upon its face will not support the adverse possession necessary to sustain a title under the statute of limitations of Illinois.*

Upon comparing this section with the acts of 1827 and 1829, upon the same subject, we have concluded that the section of the act of 1835 was not meant to give protection to a person in possession under a deed void upon the face of it. The mode of determining that is to test the deed by making a reference to the authority recited in it for making the sale, in connection with the act giving the auditor the power to sell. When the sale is found not to be according to that power, the deed is void upon its face, because the action of the auditor is illegal, and the law presumes it to be known to a purchaser. The latter can acquire no title under it. Being a void deed, possession taken under it cannot be said to be adverse and under color of title. What was the fact in this case? It is disclosed upon the face of the deed that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor. The law presumes it to have been. The act under which the sale was made was not meant to prescribe the authority of the auditor only to make sales, but also to give to purchasers full information of the terms upon which a title could be acquired to lands sold for the non-payment of taxes. It was meant to put bidders at a tax sale upon the inquiry whether or not the land was offered for sale according to law. If they do not examine, and shall buy land exposed to sale for taxes against the law, they do so at their own risk, and it will be presumed against them that they know that the deeds given under such circumstances are made in violation of official duty and of the law. It cannot be made the foundation of an adverse possession under color of title against the true owner of the land, whose title to it, the law says, can only be divested in a certain way for a forfeiture to pay taxes due upon the land. We do not put the conclusion upon the point exclusively upon the fact that it is a void deed; but that it is so, being a deed made in violation of law. It is such a deed that the defendant proposes to use to let in the proof of a possession which will be protected by the statute of 1835. Upon general principles, such a paper would not be admissible as evidence for any purpose in ejectment, and we think it was not meant to be included as one of those titles of record provided for by the act of 1835.

Before the limitation of the act can operate, it must be shown by one claiming its protection that he has been in actual possession of the land to which it is sought to be applied for seven years before the commencement of the suit, by a connected title in law or equity, deducible of record from the state or the United States, or from any public officer or other person authorized by law to sell such land for the non-payment of taxes. Such language does not apply to the general authority given by law to an officer to sell lands for taxes, but to what his authority is to sell the particular land for taxes which he exposes for sale. The words of the act are, to sell "such land for the non-payment of taxes;" that is, that land which a party claims under the deed, and from his actual residence of seven years upon it. Can it be said, then, when the auditor, as he did in this instance, sells land for non-payment of taxes short of the time

that the law authorizes him to sell, that he was an officer authorized to sell such land for the non-payment of taxes? We think not. This interpretation is more in harmony with the title which the act requires before its protection can attach. A title and seven years' actual residence upon the land are necessary. The legislature must have meant by title something more than a void deed upon its face; a title, at least, which would be sufficient to induce the possessor of the land to think, and the law to conclude, that there was a foundation for a possession under a right which had been acquired by a purchase. Not a mere naked possession, but one taken in good faith by a purchaser. The protection intended by the act cannot be better expressed than it is in the able printed argument of the plaintiff's counsel. "The legislature intended to extend its protection to persons who occupied land under a connected title *prima facie* good, against proof *aliunde* which would rebut or destroy such *prima facie* title." This conclusion, too, is supported by the case of *Skyle's Heirs v. King's Heirs*, in 2 A. K. Marshall, 385. The act of 1835 was copied from the Kentucky limitation act of February, 1809, and after the courts of Kentucky had decided that "the true construction of the words of the statute, 'a connected title in law or equity deducible from the commonwealth,' does and must mean such a title when tested by its own face, and not tried by the title of others. If the defendants' title should be a connected title in law or equity, supposing no other to exist upon the ground, then, if he proves seven years' possession holding under it, the statute shall aid him, although the plaintiff may be able to show, by the production of his own title or that of others, that the title did not, in fact nor in law, pass to the defendant." Illinois having taken the act from Kentucky, it is certainly not unreasonable to suppose that her legislators knew the construction which had been put upon it, and meant the act to give protection according to that construction.

We shall direct the point certified to this court to be answered, that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered.

Dissenting opinion by TANEY, C. J.

Upon the statements and admissions contained in this record, the question certified for the decision of this court is a very narrow one, but at the same time one of much nicety and difficulty. It is admitted that the defendants had possessed the land in dispute by actual residence thereon for the term of seven years next preceding the commencement of this suit. And if they had paid the taxes during that time, it is very clear that they were protected by the act of limitations of 1839, and the deed would in that case have been admissible in evidence. For the suit appears to have been instituted in 1848, and more than seven years had then elapsed after the passage of that act. But the case as stated is silent as to the payment of taxes, and it does not appear whether they were or were not paid by the defendants or by any other person. The rights of the parties, therefore, according to the statement as certified, must be governed by the act of limitations of 1835, and not of 1839.

The act of 1835 is loose and ambiguous in its language, and open to different interpretations. Expounded literally, it might seem to mean that a party who had a valid title on record should be protected in his possession after the lapse of seven years. This certainly was not the meaning of the legislature, because a good title of record needed no protection from the statute of limitations. It is obvious that one of the main objects of the law was to protect the possession

of persons who purchased upon the faith of conveyances made by the public officers of the state, who were authorized to sell and convey, but whose deeds, from some mistake or error of judgment on their part, were sometimes not valid, and conveyed no title to the purchaser. The law was made for a new country, where the purchasers of small tracts of land were mostly immigrants, unacquainted with the laws regulating sales and conveyances of real property, and many of them unacquainted even with the language in which the laws were written. Skilful and experienced conveyancers were not to be found in every part of the country, from whom they might take counsel. And they would naturally and fairly rely upon conveyances made by the officers of the state, purporting to be made in the execution of their official duty. It was manifestly the object of the law to protect the possessions of persons of this description, and by that means induce an agricultural population to settle in the state, and its loose and inaccurate language ought to be interpreted in the same spirit. It gave to the original owner seven years to assert his title. And if he chose for that period of time to acquiesce in the sale, and to suffer the purchaser and those claiming under him to possess and improve the land as their own, he was barred by his laches. And it undoubtedly also intended to prevent persons from prying into titles and searching for legal defects in older possessions for the purposes of speculation, where the party holding them had honestly bought and paid his money, and the original owner had for seven years acquiesced in the sale.

It is true that the case before us admits that it appears by the recitals in the deed of the auditor that the notice of the sale was not as long as the law required. And it is said that every person is presumed to know the law, and that every one who afterwards purchased under this title must therefore be presumed to have known that this deed was void.

Undoubtedly, as a general principle, every one is chargeable with a knowledge of the law in civil as well as criminal cases. This, however, is a legal presumption which every one knows has no real foundation in fact, and has been adopted because it is necessary, as a general rule, for the purpose of justice. And laws are therefore often passed to protect persons who have acted in good faith in matters of property from the consequences of their ignorance of law. Thus laws confirming defective and void deeds for real property have frequently been passed in some of the states, and their validity has been recognized by this court. Limitation laws in regard to suits for real estates are founded upon the same principle. For if the title papers of the party in possession are all legally executed and made by persons who had the right to convey, he does not need the protection of an act of limitations. The act before us was evidently and especially intended to protect purchasers from the consequences of their ignorance of the law. And with this object in view, it could make no difference whether the legal defect was shown by the recitals in the deed or appeared in any other way. The buyer would be as easily and naturally misled by his want of legal information in either case. And the law itself certainly draws no distinction between ignorance of the law in one respect and ignorance in another. And if every legal defect in the title papers of a purchaser in possession as they appear on the record may be used against him after the lapse of seven years, the law itself is a nullity and protects nobody.

To a person not well skilled in all the details of the tax laws of the state, this deed, upon the face of it, appears to be good. It was made by a public

officer authorized to sell for taxes. From his official station and duties, he would be presumed to be familiar with the tax laws in all their minute details. And he recites what he had done, states the notice given as if it was the notice the law required, and professes to convey to the purchaser a valid title in due form. Almost every one, not perfectly acquainted with the different tax laws which had been passed, would rely upon it. And I think it is one of those defective conveyances by a public officer, which the law of 1835 intended to protect after a possession of seven years.

It is said in the argument, and a judicial decision is quoted to support it, that the limitation is confined to cases where the title upon the record appears to be a valid legal title until a better one is produced. If that be the construction of the law, it protects the purchaser where, by the mistake of the officer, land has been sold upon which no taxes were due, provided the deed upon the face of it appears to be valid, and refuses to protect him where the taxes were actually due and the land liable, provided an error in the proceedings appears in the recitals in the deed. In other words, it bars the recovery of the innocent owner whose land has been wrongfully sold and protects the defaulter. Such could hardly have been the intention of the legislature. And in my opinion, the language of the law does not justify this construction. Indeed, if it be as contended for in the argument, then a mere oversight in reciting the date of the notice or date of the sale deprives the purchaser and those claiming under him of the protection of this law, although the taxes were due and the sale regularly and fairly made. For the error will appear in the recorded instrument, and consequently it is not a good and valid title on record. And this may have been the case in the deed before us.

The consideration paid at the tax sale is indeed so small as to create doubts of the fairness of the transaction. But that question is not open in this court upon the point certified. The statement in the record does not impute bad faith to either of the parties to this sale, and moreover the present defendants were not the original purchasers. For aught that appears in the statement, they purchased for a full consideration and without any actual knowledge or suspicion of a defect in the title, and have therefore strong equitable considerations to support them in claiming the protection of this statute of limitations.

I am sensible, however, as I have already said, that the construction of this statute is by no means free from difficulty. But as I do not concur in the interpretation given to it by a majority of my brethren, and the decision of the question certified may affect wider interests than those immediately involved in this suit, I have felt it my duty to state the grounds on which I dissent.

Dissenting opinion by MR. JUSTICE CATRON.

My objections to hearing this case are so strong that I deem it proper to state them. This court stands exposed to impositions by fictitious cases more than other courts do for several reasons. We have adopted it as a rule of practice that third persons cannot be heard to prove before us that a case pending on our docket is feigned, and a decision sought at our hands intended alone to affect other men's rights, by combination of the parties of record.

In the case of *Patterson v. Gaines* the attempt was made, but refused, because the persons applying to dismiss the case were no parties of record and had no right to be heard.

This of necessity throws us on the case itself, as here presented by the record, to ascertain whether it is fictitious. It is a case made on a certificate of

division; and as those divisions of opinion are usually granted of course, on facts agreed by the parties, and as they have been ordinarily granted without examination on part of the court, by way of concession, if requested by both sides (as is the case here), we are very liable to be imposed on; certainly more so than other judicial tribunals where certified cases are not allowed; and as the consequences here involved are uncommonly great, it is proper to observe unusual care to guard against imposition. The consequences of our decision will be apparent from the following facts:-

Military bounty lands were located and granted in Illinois for services rendered in the war of 1812, with Great Britain, in the name of each soldier as it stood on the muster roll. This grant inures to the benefit of his heir by act of congress. 2 Stats. at Large, 728. The United States caused the lands to be located and patented in a body, exceeding three millions of acres, in what is known as the military tract in that state, which fronts on the Mississippi river, and is unsurpassed in fertility by any equal body of land on this continent. The land in controversy is situated in this district, and is designated as the south half of section 35, in township 12 north, of range 1 west of the fourth principal meridian.

Most of these grants remained without ostensible owners for many years, and have furnished, and continue to furnish, a great source of speculation. On them the tax laws of Illinois operated, and a great portion of them have been sold for taxes. This is a prominent part of the history of Illinois. It was stated in discussion of the case of *Bruce v. Schnyler*, 4 Gilman, 249, that eight millions of dollars worth had been thus sold up to 1847. And, taking the state throughout, a much greater quantity than this, no doubt, is held under tax sales and auditor's deeds, like the one before us. It conforms to the act of 1826, which prescribes a form, and applies to deeds founded on previous and subsequent tax sales. Auditor's deeds, in the military tract, are the most usual title. Under this state of things that section of country has been settled and highly improved by a large population; cultivators confidently relying on these deeds as valid titles.

The supreme court of Illinois held, in the case of *Garrett v. Wiggins*, 1 Scammon, 335, that the act of 1829, declaring auditor's deeds, standing alone, as evidence of a good title, did not apply to sales made previous to the passing of that act. And the deed of Wiggins, not having been supported by extraneous proof that the land had been legally advertised for sale, was declared to have been made without authority, and was rejected. It follows that all deeds founded on tax sales made before 1829 are void "on their face" when standing alone. They must be supported by the act of limitations, or fall to the ground; and this support we are asked to withdraw by our decision, proceeding on a case made up under the following circumstances.

On the cause being taken up for trial in the circuit court plaintiff introduced his title regularly derived from the United States. He admitted, by special agreement, that the defendants were in possession when the suit was brought. They then offered to prove that they had been seven years in possession, holding under a connected title derived from a public officer authorized by law to sell the land for non-payment of taxes, and, as the first link in their chain of title, offered a deed made by the auditor, which is set out. To its introduction the plaintiff objected, on the ground that, by reference to the face of the deed, "and the law as it stood" when the sale was made, to wit: "An act entitled an act for levying and collecting a tax on land, and other property,"

approved February 18, 1823, it appeared that the sale for non-payment of taxes had been made by the auditor "at an earlier day than he could, according to law, possibly do; and so it occurred as a question, whether said deed was admissible in evidence for the purpose, and in the connection for and in which the defendants offered it, the objection aforesaid notwithstanding; on which question the opinions of the judges were opposed."

This is the case certified for our opinion. The parties agreed to the facts, made the case, and conjointly moved for a certificate of division. It was especially the act of the defendants, as on their right to make defense we are asked to pass judgment.

It is agreed that they held under a void deed; that it was not made according to law, and void on its face. They admit that the auditor did an act which he could not possibly do as auditor. Thus, the defendants by this agreement made the worst case for themselves that they could make, and the best case for their adversary that could be made up, for the purpose of having a decision against the defendants on the act of limitations. This is manifest, and not open to dispute. No power is left to this court to inquire whether the auditor had, or had not, authority to sell for taxes due in the years 1821 and 1822 by advertising in advance of October 1, 1823, for three weeks, and selling afterwards, in December, when the eighty-two days required by the act of 1823 had expired from the first advertisement.

The twenty-sixth section of the act declares that the first sale of lands made by the auditor shall take place in December, 1823; at what time in December the act does not provide. It depends on a true construction of the law. But the agreement cuts off all power of inquiring as to what the true construction of the law is; it concludes the question, and forces us to hold that the auditor sold without authority, and that his deed is void on its face; whereas the deed recites that the land had been sold "in conformity with all the regulations of the several acts in such cases made and provided." It refers to no one particular law, and is fair on its face; nor could any man, not learned in the law, suppose to the contrary. Certainly not Illinois farmers, many of whom do not even read or speak our language.

In the next place, a written argument is furnished to us by the plaintiff, coming from Illinois, presenting his case in the most cogent manner, on which it is submitted; whereas, the defendants make no appearance here by counsel, set up no defense, but give the plaintiff every advantage he may desire, or can possibly have. As I have never known a real contest thus conducted, my mind is led to the conclusion that this is a fictitious proceeding, intended to open a door for speculation, and to affect the rights of others, and that it ought not to be acted on by this court. But as a majority of my brethren are unwilling to dismiss the case, and have proceeded to decide the question whether a deed purporting to be founded on a tax sale, and which is void on its face (when compared with that law), furnishes color of title, I of course acquiesce, and will briefly examine that question.

For the purpose of arriving at a proper construction of the act of limitations of Illinois, the previous legislation of that state must be taken into consideration, so far as it can be done, from the meagre information we have been enabled to collect. From this legislation, so far as it is ascertained, it appears that the auditor was bound by law to make deeds to purchasers at tax sales, according to the prescribed form given by the act of 1826. These deeds were

ordered to be recorded. The one before us is in the prescribed form, and stood duly recorded when the act of limitations was passed.

The act requires actual residence on the land for seven years, under a connected title, deducible of record from the state, or from the United States, or from any public officer authorized by the laws of the state to sell lands for the non-payment of taxes.

This act is peculiar in its terms, and was made under peculiar circumstances. It was unquestionably made, as it seems to me, to protect actual settlers and cultivators, whose titles were liable to exception, against speculators and others having better titles, but who should neglect to avail themselves of their legal advantage within the time limited. In order to make a successful defense, it was necessary for these defendants to prove a seven years' residence on the land, under a connected title deducible of record from the state of Illinois, or from some public officer acting for the state, authorized to sell for non-payment of taxes. The auditor was such officer. He acted for the state; and a title in all respects emanating directly from the state is exhibited in support from a seven years' possession. A connection with a patent from the United States is equally clear. The land was assumed to be sold by force of lien for taxes due; such sale carried the true owner's title throughout, including the patent, regardless of the fact in whose name the land was advertised and sold. So the laws of Illinois expressly provide. No further connection of title can exist; nor does the act of limitations require more. But to avoid its force an attempt is made to introduce an exception not found in the act, which of necessity comes to this, that if the deed is void for legal defect, or for a defect which depends on evidence, a link in the chain of title is wanting.

If it be true that the purchaser under a tax sale and deed is bound to ascertain the law, and if the deed is found to be void when tested by the law, and the acts done under it, no connection can be established, nor protection had, under the act of limitations; then the statute is a mere delusion, as it can only be resorted to where there is a good title.

The act was not thus idly made. It has no reference to titles good in themselves, but was intended to protect apparent titles, void in law, and to supply a defense where none existed without its aid. Its object was repose. It operates inflexibly, and on principle, regardless of particular cases of hardship. The condition of society, and protection of ignorance as to what the law was, required the adoption of this rule. This is plainly so. It was not to be expected that immigrants into a new country like Illinois, who came there seeking lands for homes, were capable of judging what complicated revenue laws required to be done to make a valid tax sale. If they found a title of record from a public officer, such as the auditor was, having general power to sell for non-payment of taxes, they were authorized to believe such title a good one, and to purchase under it. And it would be bad policy, and unjust, after the land had been improved by their labor, and increased in value perhaps twenty-fold, during a long possession, to turn them off, even by a meritorious owner, if he did not come in time. And still worse policy would it be, to leave them open to speculating purchasers, buying up doubtful titles over their heads, under the act of 1845, which allows of such purchases in Illinois. Harassment and ruin inflicted on the unsuspecting many, by the well-informed and unscrupulous few, must be, as it ever has been, the consequence of stripping cultivators of the soil of their titles by unfavorable and strained con-

structions; and, therefore, acts of limitation have at all times been liberally construed to protect cultivators in homes where their families were, and had usually grown up. And as the act of Illinois applies to actual residents and to no others, it is entitled to a liberal construction. The one contended for is, that he who takes title by deed of record, or under one claiming by deed of record, made by a public officer with general power to sell for non-payment of taxes, is bound to know the law authorizing the officer to sell and convey; and if he fails to ascertain the law by negligence, he is held to knowledge that power was wanting, if such be the fact; that, purchasing with presumed knowledge, his title is taken in bad faith; his deed is tainted with fraud and is no deed, but is as blank paper; and being so, a link in the chain of title is wanting, and the statute cannot apply for want of connection of title.

This is the sum and substance of the reasoning employed on behalf of plaintiff to reject the application of the statute. Now is this a liberal construction? Is it not in effect a repeal of the statute, and the most harsh construction that can be given to it? As, if this assumption be true, no possible conveyance made by a public officer, which is void because the requisite forms of law have not been complied with, can be maintained. All must equally fall, if not good in themselves, when compared with the law, and the acts required by law to be done before the sale is made.

We have been referred to various decisions which are supposed to support this doctrine, and especially to that made by the court of appeals in Kentucky in 1820, in the case of *Skyles v. King*, 2 A. K. Marsh., 385. This case has had controlling influence in our investigations, by far more than all others. It was this. The elder patent was made to King. Skyles claimed and held under a younger patent and seven years' adverse possession. He was defendant. The statute of Kentucky declares that, to form the bar, there shall be "a connected title in law or equity, deducible of record from the commonwealth." On a trial before a jury, it was insisted that, by the terms of the act, it applied to the elder patent set up by the plaintiff; that with his patent there must be connection to form a bar. And so the circuit court held the true meaning of the act to be, and so instructed the jury. But the court of appeals thought otherwise, and reversed the judgment, holding that the act meant a title tested by its own face; that is, commencing with the younger patent, and connecting with that, regardless of the elder and adversary title; that the act had no reference to the elder patent. There, the first link (the younger patent) was void, and this plainly appeared of record, as all patents in Kentucky are recorded; it follows that, if that decision is adopted as a true construction of the Illinois statute, the case before us must be decided for the defendants; as here the first title paper offered by them is in the same condition as the younger Kentucky patent.

The cases in this court of *Patton v. Easton*, 1 Wheat., 476, and of *Walker v. Turner*, 9 Wheat., 541, are also relied on as in point. The latter one is clearly so. It held that a void sheriff's deed was no deed, and could not be given in evidence as a link in the chain of title, nor be upheld by seven years' adverse possession under the act of limitations of Tennessee, which required a title by grant, or deed or conveyance founded on a grant, to form a bar; and which was construed to require connection of title. This court followed the supposed settled construction of the courts of Tennessee on their own statute. But this was a mistake, there not being any such settled construction.

In 1832 the case of *Green v. Neal*, 6 Pet., 291, again brought before this

court the same question on the Tennessee act. At that time all controversy was settled by a decision of the supreme court of Tennessee, in the case of *Gray & Reeder v. Darby's Lessee, Martin & Yerger*, 396, which held that a sheriff's sale and deed, made pursuant to a void judgment in a case where no jurisdiction existed in the court entering such judgment, was a sufficient connection of title; that to hold otherwise would be requiring a good connected title, and a virtual repeal of the statute. This decision was followed in the case of *Green v. Neal*; and all the former cases decided by this court on the Tennessee act, holding that a void deed broke the connection, were overruled, and are of no authority anywhere. They merely followed a supposed settled construction in the first two cases, and a settled one in the last case of *Green v. Neal*. And so we would now be bound to follow the settled construction of the courts of Illinois, if any such existed, on the statute before us.

My opinion, therefore, is, that it ought to be certified to the circuit court that the auditor's deed should be admitted in evidence, and that it furnishes color of title on which the act of limitations could operate.

MR. JUSTICE GRIER dissented.

§ 799. *Color of title.*—A deed which, by apt words of transfer from grantor to grantee, in form passes what purports to be the title, will give color of title, whether such grantor acts under authority of judicial proceedings or otherwise. Action, commenced in 1857, to recover certain lands to which the defendant claimed title under a deed in partition suit executed in 1838, in which there had been no personal service of process upon the legal owner, who was then a minor. His guardian *ad litem* filed an answer, and as the cause was of more than twenty years' standing, the title was barred. *Hall v. Low*, * 12 Otto, 461.

§ 800. *Payment of taxes for even more than twenty-one years, without an adverse possession during that length of time, gives no color of title, though it defines extent of claim.* *Girard v. The City of Philadelphia*, 2 Wall. Jr., 301.

§ 801. *Color of title is not title but only the appearance of title.* Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. It matters not whether the grantor had any title or not; if from the face of the deed, compared with the law regulating the subject, he *might* have had title, his formal conveyance gives color of title to possession taken under it. *Stark v. Starr*, 1 Saw., 15.

§ 802. *In general the rules applicable to real property are applicable to mining claims.* Hence a purchaser in possession of a mining claim under a conveyance regular in form is in by color of title, which in time, under the statute of limitations, will ripen into a perfect right, which he may maintain against all other persons. *Harris v. Equator Mining & Smelting Co.*, 8 Fed. R., 868.

§ 803. *Color of title under a void and worthless deed will be received as evidence that the person in possession claims for himself and adverse to all the world.* A person in possession of land, clearing, improving and building on it, and receiving the profits to his own use, under claim of title, is not bound to show a forcible ouster of the true owner. Color of title is received in evidence for the purpose of showing the possession to be adverse. *Pillow v. Roberts*, 13 How., 472, reversing *Roberts v. Pillows*, * Hemp., 624.

§ 804. *Junior patent.*—A junior patent, followed by possession, will give sufficient color of title to be protected, under the statute of limitations of Tennessee, although the true owner was prevented from maintaining an action to recover possession. So held in an action to recover certain lands in Tennessee, where plaintiff claimed under a grant from North Carolina of a larger tract, including the premises sought to be recovered, and defendants claimed under a junior patent. *McIver v. Ragan*, * 2 Wheat., 25.

§ 805. *A junior patent is a title that will be protected by the statute of limitations.* *Bryan v. Forsyth*, 19 How., 334.

§ 806. *Extent of possession.*—A person entering on land under a deed specifying its boundaries is in possession to the extent thereof, though his grantor had only an entry which did not appear to cover it and which was unperfected by survey or patent. *Ellicott v. Pearl*, 10 Pet., 444.

§ 807. *Illinois.*—Under the Illinois statute of limitations of 1835 seven years' possession under a connected title in law or equity deducible of record from the state or the United

States, or from some public officer or other person authorized by the laws of the state to sell such land for the non-payment of taxes, or from some sheriff, marshal or other person authorized by the laws of the state to sell such land on execution, or under some order, judgment or decree of some court of record, is necessary to give title. *Arrowsmith v. Burlingim*,* 4 McL., 489.

§ 808. Under the first section of the statute of limitations of Illinois of 1839, it is necessary for the claimant to show actual possession of the premises for seven successive years, and the payment of all taxes for seven successive years, and that the possession was under claim and color of title made in good faith. The period of limitations begins to run with the possession. A void deed taken in good faith is a sufficient color of title. It is not necessary that each year's taxes should have been paid within the year. The taxes for one year may be paid in another of the seven years. Under the second section, the claimant must show the payment of taxes for seven successive years, that the land was vacant and unoccupied during that time, and that he had, during the same time, color of title made in good faith. Under this section the bar begins with the first payment of taxes after the party has acquired color of title. Payment of taxes without color of title is of no avail. *Beaver v. Taylor*,* 1 Wall., 637.

§ 809. In order to make a defense under the eighth section of the act of 1839 of Illinois, the tenant in possession must have acted in good faith in acquiring his title. He must have entered with intent to occupy, believing the land to be his, and must continue in possession seven years before an action for the title shall be brought. He must pay all the taxes legally assessed thereon. Under the ninth section, he must claim under color of title, in good faith, and must pay all the taxes assessed for seven years before suit brought, and the land must remain vacant and unoccupied for the entire period. The claimant under the ninth section must comply strictly with the statute. A title cannot be made under both sections; it must be valid according to the one or the other. *Russell v. Barney*,* 6 McL., 577.

§ 810. The statute of limitations does not run by relation. It does not begin to run in favor of one in possession claiming title or color of title under a tax deed until the deed is delivered. So a jury was charged in an action to recover certain land in Illinois. The plaintiffs claimed title under a patent from the United States issued in 1818, the defendant under a sale in 1839 to Fash for the taxes of 1838. The deed was not issued until June 1, 1850, which was subsequent to the commencement of the action. The defendant had been in possession of the land by actual residence and had paid the taxes for seven successive years prior to the commencement of the suit. *Holden v. Collins*,* 5 McL., 189.

§ 811. Under the Illinois statute of limitations of 1835 seven years' possession under a connected title in law or equity deducible of record from the state or the United States, or from some public officer or other person authorized by the laws of the state to sell such land for the non-payment of taxes, or from some sheriff, marshal or other person authorized to sell such land on execution, or under some order, judgment or decree of some court of record, is necessary to give title. To establish a title under an auditor's deed for lands sold for taxes it must be shown that the requirements of the law have been complied with. So held in an action brought to recover certain lands in Illinois. The defendant claimed under mesne conveyances from the purchaser from the auditor for a sale of the lands in 1829 for the taxes of 1827. The deed was dated in 1831. Also under seven years' residence on the land next preceding the bringing of the action, and payment of taxes assessed during that time. The phraseology of the statute is virtually in the words above. The defendant did not show the validity of the tax sale, and judgment was in favor of plaintiff. *Arrowsmith v. Burlingim*,* 4 McL., 489.

§ 812. In Illinois, under the law of 1839, an auditor's deed for the sale of land for taxes is *prima facie* good, and when connected with seven years' actual possession and payment of taxes, becomes invincible. So held in an action to recover certain lands which were patented to William Purdy in November, 1837, and conveyed by him to plaintiff. The defendant and those under whom he held claimed under a deed from the state auditor, dated February 2, 1830, under a sale for taxes of 1827. He had been in possession for seven years, under his deed, before suit brought. *Mattison v. Walker*,* 1 Biss., 62.

§ 813. A person claiming title to land under the limitation law of Illinois (ch. 83, § 4, R. S. of 1874) must deduce his title of record from the United States or from some person authorized to sell land for taxes, or from a marshal's or sheriff's sale, or some other judicial proceeding. Each link in the chain must be a genuine conveyance. *Hedges v. Paulin*,* 5 Biss., 177.

§ 814. Missouri.—Twenty years' possession of land under an administrator's sale bars an action by the heirs in Missouri, in the absence of circumstances taking the case out of the statute of limitations. *Long v. O'Fallon*, 19 How., 116.

§ 815. In Louisiana a deed from a person who has authority to sell is a good title for the purpose of prescription. *Pike v. Evans*, 4 Otto, 6.

§ 816. North Carolina.—A void and worthless deed is evidence that the person in possession claims adversely to all the world. It will give color of title, and mere notice of a better title

in some other person will not prevent the operation of an adverse possession under such color of title. A sheriff's deed is such color of title as, with seven years' continuous possession of the land under known and visible boundaries, would establish a title against everybody except the state. So a jury was charged in an action to recover certain land in North Carolina. The defendants claimed title from L. C. Thompson, who had purchased the lands in 1863 from a Confederate receiver, A. B. Magruder. One of the defendants and the grantee of Thompson went into possession under his deed in 1863, and remained in possession until 1865, when he rented the same, since which time his tenants have had possession. The action was commenced in 1877. *McIntyre v. Thompson*,* 10 Fed. R., 531; 4 Hughes, 562.

§ 817. Oregon.—One entering under color of title may claim all the land embraced in his deed although not actually occupied. So a jury was charged in an action to recover certain real property in Oregon, commenced in 1871 by one who deraigned title from the United States, and defendants, relying on the statute of limitations, gave in evidence certain defectively executed deeds and parol evidence tending to prove sales. *Shuffleton v. Nelson*,* 2 Saw., 541.

§ 818. Tennessee.—In Tennessee, adverse possession of seven years, claiming under a deed, where the land has been granted, will bar the legal title. In an action to recover certain lands in Tennessee, the plaintiff showed a grant from the state and a regular chain of conveyances to his lessor. The defendant claimed under Edward Dillon, the grantee of Andrew Jackson, and showed possession in persons claiming under and for Dillon for more than seven years adverse to plaintiff. The statute of 1797 protects those who had had seven years' peaceable possession of any land by virtue of a grant, or deed of conveyance "founded on a grant." It was held that the possessor was entitled to the benefit of the statute. *Green v. Neal*, 6 Pet., 291 (§§ 142-44).

§ 819. Under the statute of limitations of Tennessee of 1797, seven years' possession, by virtue of a grant, or mesne conveyances founded on a grant, will create a bar to the lawful title. Possession under a sheriff's deed, which is void, is not such possession as will be protected by the statute. So held in an action brought in 1818 to recover a certain lot in Nashville, Tennessee. The defendants claimed under a sheriff's deed, dated July 22, 1809, to Roger B. Sappington. This deed was void, as it gave title under an execution sale on a justice's judgment in a case over which he had no jurisdiction. Sappington and those under him had been in possession and exercised acts of ownership over the lot. *Walker v. Turner*,* 9 Wheat., 541. (a)

§ 820. The defendant in ejectment need not show a regular and connected chain of legal title from the original grantee in order to avail himself of the bar of the statute of limitations. *Sawyer v. Shannon*,* 1 Overt. (Tenn.), 465.

§ 821. Under the Tennessee statute of limitations of 1797, providing in effect that seven years' peaceable possession of any land, "by virtue of a grant, or deed of conveyance founded upon a grant," shall give the possessor a good title thereto, held, that although a regular title in form is not necessary, a naked possession is not sufficient, but that the person seeking to avail himself of such possession must have a color of title. *Patton v. Hynes*,* 1 Cooke (Tenn.), 356.

§ 822. To constitute color of title there need not be a regular chain of conveyances. If the possession has been taken in such a way as to authorize a belief that the possessor imagined he was occupying his own property, that will be color of title. *Ibid*.

§ 823. Texas.—Hasbrook owned a lot in Galveston. The plaintiff, Atchison, claimed to have purchased from Curtis, Hasbrook's grantee. The defendant, League, claimed title under a sale of the lot under a judgment against Hasbrook posterior to the sale to Curtis, alleging the deed to Curtis to be a forgery. Besides this he set up the statute of limitations. The effect of the statute was that suit to recover possession of real property against those in possession under title or color of title must be instituted within three years after the cause of action accrued. Title was defined to be "a regular chain of transfer from or under the sovereignty of the soil," and color of title to be "constituted by a consecutive chain of such transfers down to him or her or them in possession, without being regular," as if one or more of the instruments had not been registered or duly registered, or be only in writing, etc. It was held that a link in the chain of title of defendant was absent; that there was not a mere defect or flaw, but that there was no chain at all; that there could be no color of title where there is a complete hiatus in the chain. *League v. Atchison*,* 6 Wall., 113.

§ 824. Under the fifteenth section of the statute of limitations of Texas, a certificate of purchase is not a document purporting to convey title, and does not constitute a link in a consecutive chain of transfers, and will not give title or color of title. An actual deed or conveyance

(a) This case is virtually overruled by *Green v. Neal*, 6 Pet., 291 (§§ 142-44). Compare, also, *McIntyre v. Thompson*,* 10 Fed. R., 531, and *Mattison v. Walker*,* 1 Biss., 63.

is necessary to constitute a link. Baldwin bought three lots in Galveston, Texas, from a company, which issued a certificate of purchase but did not execute a deed. This certificate was assigned to Holman in trust to take care of and protect the lots. In 1846 the sheriff levied on the lots under an execution issued on a judgment against Holman, and sold to Osterman, to whom he also executed a certificate. In 1850 Baldwin brought this action to have the execution sale declared void and to compel the execution of a deed to him. The defendant relied on the statute of limitations, which provides that every suit to recover real estate as against him in possession under title, or color of title, shall be instituted within three years. Color of title is constituted by a consecutive chain of transfers from or under the sovereignty of the soil. *Osterman v. Baldwin*,* 6 Wall., 116.

§ 825. Wisconsin.—It is not necessary, under section 4211 of Revised Statutes of Wisconsin, 1878, that the deed under which entry is made should be valid in order to give good title by adverse possession. Ten years' occupation in good faith under claim of title is all that is required, and this claim of title may be based upon either a tax or a quitclaim deed. *Cowly v. Monson*,* 5 Fed. R., 779.

§ 826. Miscellaneous.—The laches of the defendant in ejectment, in not executing a special warrant, from 1753 to 1765, his entire silence and acquiescence from that time until still later, when an unauthorized surveyor was called upon to do it, is sufficient to defeat every pretense of equity against a legal title in a fair *bona fide* purchaser without notice. *Gordon v. Kerr*, 1 Wash., 322.

§ 827. Statute of limitations will not run in favor of grantee in deed intended as mortgage. His possession is not adverse. *Babcock v. Wyman*, 19 How., 289.

§ 828. Parties who have claimed title under an alleged will cannot, as against the universal legatee of the true will of the same testator, set up the prescription of ten years as possessors in good faith. *Gaines v. Lizardi*, 3 Woods, 92.

§ 829. The civil code of Louisiana, article 3540 (3505), prescribing actions for nullity of testaments, etc., by five years, has no application to a will invoked as a muniment of title by a party out of possession. *Gaines v. Lizardi*, 3 Woods, 77.

§ 830. A deed for land sold for taxes which on its face shows that proper notice was not given is void and cannot be set up under the statute of limitations. *Moore v. Brown*, 4 McL., 212.

§ 831. A party who holds adverse possession of lands claiming under what turns out to be a spurious title cannot upon sale of the land be held to be the trustee of the one who holds the genuine title, nor can he be made to account for the proceeds of the sale. *Gaines v. Lizardi*, 1 Woods, 56.

§ 832. The lien of a judgment is not a title to the land, nor a claim of title, against which the statute of limitations can operate. *Kemper v. Adams*, 5 McL., 507.

4. Adverse Possession of Vacant Property.

SUMMARY.—Acts of ownership after entry, § 833.—Adverse possession of city lot for five years, § 834.—Possession of a part, § 835.—Possession within certain boundaries, § 836.

§ 833. Visible and notorious acts of ownership after an entry under claim or color of title is sufficient to constitute adverse possession. So held where the property consisted of a city lot situated on a hill side. The bed of the lot was sand and gravel. It had been used for digging sand and gravel. Actions of trespass had been brought against persons digging without permission. *Ewing v. Burnet*, §§ 837-48.

§ 834. Open adverse possession of a vacant city lot claiming title for more than five years will bar the title of the true owner in California. Where property is so situated as not to admit of use or residence, actual occupation, cultivation or residence are not necessary to constitute legal possession if the continued claim is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right and would not exercise over property which he did not claim. *Harris v. McGovern*, §§ 844-46.

§ 835. Actual occupancy of part of a tract of land, together with color of title to the whole, is possession of the whole. Thus where a patent to certain land in Illinois was issued to Charles Ballance in January, 1853, subject to the rights of any and all persons claiming under the act of congress of March 3, 1823, and he conveyed different portions to different persons, who actually resided on portions of part so conveyed to them, and leased other portions, it was held that they had constructive possession of the entire portion so conveyed to them. *Gregg v. Forsyth*, §§ 847-50.

§ 836. Long, continuous, notorious, exclusive possession of lands up to certain division lines, where such possession was taken under a deed, and has been acquiesced in by the adjoining

owners, will give title up to such lines, although erroneous. So held where certain land was conveyed to Leete in 1871, and he entered and marked the boundaries by monuments and hedges and expended large sums of money in improvements, claiming the boundaries so marked out to be the true ones. The officers of his grantor were cognizant of these claims, and acquiesced in them. An action was brought in 1877 to recover the land between the true and the actual boundaries. The statutory limitation was five years. *Brown v. Leete*, §§ 851-53.

[NOTES.— See §§ 854-866.]

EWING v. BURNET.

(11 Peters, 41-54. 1837.)

ERROR to U. S. Circuit Court, District of Ohio.

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.— In the court below, this was an action of ejectment brought in November, 1834, by the lessor of the plaintiff, to recover possession of lot No. 209, in the city of Cincinnati; the legal title to which is admitted to have been in John Cleves Symmes, under whom both parties claimed; the plaintiff by a deed dated 11th of June, 1798, to Samuel Foreman, who on the next day conveyed to Samuel Williams, whose right, after his death, became vested in the plaintiff; the defendant claimed by a deed to himself, dated 21st of May, 1803, and an adverse possession of twenty-one years before the bringing of the suit. It was in evidence that the lot in controversy is situated on the corner of Third and Vine streets, fronting on the former one hundred and ninety-eight, on the latter ninety-eight feet; the part on Third street is level for a short distance, but descends towards the south along a steep bank from forty to fifty feet to its south line; the side of it was washed in gullies, over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil; the lot was not fenced, nor had any building or improvement been erected or made upon it, until within a few years before suit brought; a fence could have been kept up on the level ground on the top of the hill on Third street, but not on its declivity, on account of the deep gullies washed in the bank; and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third street separated this lot from the one on which the defendant resided from 1804 for many years, his mansion fronting on that street; he paid the taxes upon this lot from 1810 to 1834, inclusive; and, from the date of the deed from Symmes until the trial, claimed it as his own. During this time, he also claimed the exclusive right of digging and removing sand and gravel from the lot; giving permission to some, refusing it to others; he brought actions of trespass against those who had done it, and at different times made leases to different persons for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so; on the contrary, several witnesses testified to his continued assertion of right to the lot; their knowledge of his exclusive claim, and their ignorance of any adverse claim for more than twenty-one years before the present suit was brought.

They further stated, as their conclusion from these facts, that the defendant had, from 1806 or '7, in the words of one witness, "had possession of the lot;" of another, that since 1804 "he was as perfectly and exclusively in possession as any person could possibly be of a lot not built on or inclosed;" and of a

third, "that since 1811 he had always been in the most rigid possession of the lot in dispute, a similar possession to other possessions on the hill lot." It was further in evidence that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati from 1803 till his death in 1824; was informed of defendant having obtained a deed from Symmes in 1803, soon after it was obtained, and knew of his claim to the lot; but there was no evidence that he ever made an entry upon it, demanded possession or exercised or assumed any exercise of ownership over it, though he declared to one witness, produced by the plaintiff, that the lot was his, and he intended to claim and improve it when he was able. This declaration was repeated often, from 1803 till the time of his death, and on his death-bed; and it appeared that he was, during all this time, very poor; it also appeared in evidence, by the plaintiff's witness, that the defendant was informed that Williams owned the lot before the deed from Symmes, in 1803, and after he had made the purchase.

This is the substance of the evidence given at the trial, and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause; whereupon the plaintiff's counsel moved the court to instruct the jury that on this evidence the plaintiff was entitled to a verdict; also that the evidence offered by the plaintiff and defendant was not sufficient in law to establish an adverse possession by the defendant; which motions the court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions. 1. The refusal of the court to instruct the jury that he was entitled to recover. 2. That the defendant had not made out an adverse possession.

§ 837. *When charge "that under the evidence plaintiff is entitled to recover" is proper.*

Before the court could have granted the first motion, they must have been satisfied that there was nothing in evidence, or any fact which the jury could lawfully infer therefrom, which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the court must assume such fact to have been proved; for it is the exclusive province of the jury to decide what facts are proved by competent evidence. It was also their province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked must depend upon the opinion of the court on a finding by the jury in favor of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff.

Now, as the jury might have refused credence to the only witness who testified to the notice given to the defendant of Williams' ownership of the lot in 1803, and of his subsequent assertion of claim, and intention to prove it, the testimony of this witness must be thrown out of the case, in testing the correctness of the court in overruling this motion; otherwise we should hold the court below to have erred in not instructing the jury on a matter exclusively for their consideration; the credibility of a witness, or how far his evidence tended to prove a fact, if they deemed him credible. This view of the case throws the plaintiff back to his deed, as the only evidence of title; on the legal effect of which the court were bound to instruct the jury as matter of law, which is the only question to be considered on this exception.

It is clear that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seizin and possession thereof, co-extensively with his right; which continued till he was ousted by an actual adverse possession (6 Pet., 743), or his right of possession had been in some other way barred. It cannot be doubted that from the evidence adduced by the defendant, it was competent for the jury to infer these facts; that he had claimed this lot under color and claim of title, from 1804 till 1834; had exercised acts of ownership on, and over it, during this whole period; that his claim was known to Williams and to the plaintiff, was visible; of public notoriety for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams' claim; that it was unknown to the inhabitants of the place, while that of the defendant's was known; and that Williams never did claim the lot, or assert a right to it from 1803 till his death in 1824. The jury might also draw the same conclusion from these facts as the witnesses did, that the defendant was during the whole time in possession of the lot, as strictly, perfectly, and exclusively, as any person could be of a lot not inclosed or built upon; or as the situation of the lot would admit of. The plaintiff must, therefore, rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title, or by an adverse possession.

§ 837a. *Circumstances may justify a presumption of release, conveyance, or abandonment of claim.*

On the evidence in the cause the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession as would have been a legal bar under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years (6 Pet., 513); and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and if the jury could so presume, there is no error in overruling the first motion of the plaintiff.

§ 838. *An entry on land is an ouster, or not, according to intention with which it is made.*

On the next motion the only question presented is on the legal sufficiency of the evidence to make out an ouster of the legal seizin and possession of Williams by the defendant, and a continued adverse possession for twenty-one years before suit brought.

An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster, otherwise it is a mere trespass; in legal language, the intention guides the entry, and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot as early as 1804 cannot be doubted; nor that he claimed the exclusive right to it under color of title, from that time till suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to

justify a finding that they were in assertion of a right in himself; so that the only inquiry is as to the nature of the possession kept up.

§ 839. *Adverse possession need not be by fence, building, or improvement. Visible and notorious acts of ownership after ouster are sufficient.*

It is well settled that to constitute an adverse possession there need not be a fence, building, or other improvement made (10 Pet., 442); it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years, after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant without interruption, or an adverse entry by him, for twenty-one years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, or residence, are necessary to constitute actual possession (6 Pet., 513), when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. Whether this was the situation of the lot in question, or such was the nature of the acts done, was the peculiar province of the jury; the evidence, in our opinion, was legally sufficient to draw the inference that such were the facts of the case; and if found specially, would have entitled the defendant to the judgment of the court in his favor; they, of course, did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession.

§ 840. *Notorious occupancy of the premises by exclusively taking, using and selling sand therefrom fully meets all requisites of adverse possession.*

The remaining exceptions are to the charge of the court, in which we can perceive no departure from established principles. The learned judge was very explicit in stating the requisites of an adverse possession; the plaintiff had no cause of complaint of a charge stating that exclusive appropriation by an actual occupancy; notice to the public, and all concerned of the claim; and enjoyment of profits by defendant, were all necessary. No adjudication of this court has established stricter rules than these; and if any doubts could arise as to their entire correctness, it would be on an exception by the defendant. In applying them in the subsequent part of the charge to the evidence, there seems to have been no relaxation of these rules. The case put by the court, as one of adverse possession, is of a valuable sand bank exclusively possessed, and used by the defendant for his own benefit, by using and selling the sand; and this occupancy, notorious to the public and all concerned, which fully meets all the requisites before stated, to constitute adverse possession.

§ 841. — *payment of taxes.*

If we take the residue of the charge literally, it would seem to superadd other requisites, as the payment of taxes; ejecting and prosecuting trespassers on the lot; its contiguity to the defendant's residence, etc.; but such is

not the fair construction of the charge, or the apparent meaning of the court. These circumstances would seem to have been alluded to to show the intention with which the acts previously referred to were done; in which view they were important, especially the uninterrupted payment of taxes on the lot for twenty-four successive years, which is powerful evidence of a claim of right to the whole lot. The plaintiff's counsel has considered these circumstances as making a distinct case, in the opinion of the court, for the operation of the statute, and has referred to the punctuation of the sentence in support of this view of the charge. Its obvious meaning is, however, to state these as matters additional or cumulative to the preceding facts; not as another distinct case made out by the evidence, on which alone the jury could find an adverse possession.

§ 842. *Punctuation as a guide in the interpretation of an instrument.*

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.

§ 843. *Adverse possession with notice of a prior deed.*

It has also been urged in argument that, as the defendant had notice of the claim of Williams, his possession was not fair and honest, and so not protected by the statute. This admits of two answers. 1. The jury were authorized to negative any notice. 2. Though there was such notice of a prior deed as would make a subsequent one inoperative to pass any title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar; the statutory protection being necessary only where the defendant has no other title but possession during the period prescribed. The judgment of the circuit court is therefore affirmed. (a)

HARRIS v. MCGOVERN.

(9 Otto, 161-168. 1878.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Actual title to the lot in controversy is claimed by the plaintiffs as devisees and heirs of Stephen Harris, deceased, by virtue of an ordinance of the city, which, as they allege, was subsequently ratified by an act of congress. Opposed to that the theory of the defendants is that the city ordinance granted the lot to Stephen A. Harris, under whom they derive title, and that inasmuch as they have been in the open adverse possession of the same, claiming title, for more than five years, the title of the plaintiffs, if any they or their testator ever had, is barred by the statute of limitations.

Possession being in the defendants the plaintiffs brought ejectment, and the defendants appeared and pleaded as follows: 1. The general issue. 2. That they were seized in fee-simple of the premises. 3. That the title and right of possession of the plaintiffs were barred by the statute of limitations.

Pursuant to the act of congress the parties waived a jury and submitted the evidence to the court. Special findings were filed by the judge presiding, with his conclusions of law, as exhibited in the record. Hearing was had, and

(a) Affirming *Ewing v. Burnet*, * 1 McL., 266.

the court rendered judgment in favor of the defendants, and the plaintiffs sued out the present writ of error.

Three errors are assigned, as follows: 1. That the court erred in the conclusion of law that the statute of limitations began to run as early as July 1, 1864, as found in their first conclusion of law. 2. That the court erred in the conclusion that the defendants were in possession of the premises for more than five years subsequent to the time when the statute of limitations commenced to run. 3. That the court erred in their fourth conclusion of law, that the defendants were entitled to judgment.

Actions of the kind cannot be maintained in that state unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within five years before the commencement of such action. Stats. Cal. 1863, 326; 2 Code, sec. 318.

From the findings of the circuit court it appears that the lot in controversy is within the corporate limits of the city, and that it is situated west of Larkin street and northwest of Johnson street, as they existed prior to the passage of the ordinances, which were afterwards ratified by the act of the legislature of the state. Stats. Cal. 1858, 53. Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to the city and its successors. 13 Stat., 333, sec. 5.

Prior to the incorporation of San Francisco the locality was known as the pueblo or town by that name, and the findings of the court show that on September 25, 1848, the alcalde of the pueblo made a grant in due form of the land in controversy to a party designated in the instrument by the name of Stephen A. Harris, which grant was duly recorded in the official book of records kept for that purpose; that at that date there was a man residing in that pueblo by the name of Stephen A. Harris and another man by the name of Stephen Harris; that the grant was intended for and delivered to the latter and not to Stephen A. Harris; and that Stephen Harris, to whom the grant was delivered, acquired all the title that passed or was conveyed by the grant of the alcalde. It also appears that Stephen Harris, two years later, left California, and that he never returned to that state; that he went to New Jersey, where he remained several years, and then removed to Illinois, where, on the 5th of November, 1867, he died, leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children.

By the fifth finding of the court it appears that there was no evidence introduced tending to show that the deceased, or the plaintiffs, or any person claiming through or under them, ever improved the land, or was ever in the actual possession or occupation of the land or any part of the same. On the other hand, it appears that Stephen A. Harris, May 1, 1854, conveyed the land to the person named in the sixth finding, by deed in due form, which was duly recorded, and that all the right, title and interest thus acquired by the grantee by sundry mesne conveyances subsequently vested in the defendants for a valuable consideration, without notice of the claim of the plaintiffs or their testator.

There was no evidence to show that any party was in actual occupation of the land January 1, 1855, or any time between that date and the 1st day of July of the same year; but the seventh finding of the court shows that one of the grantors of the defendants, in the spring of 1864, took actual possession of the land, claiming title under one of the said mesne conveyances, and

that he fenced and occupied the lands, and that he and his several grantees, including the defendants, have since that time to the present been in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith against all the world, under the said several mesne conveyances.

Section 5 of the act of congress of July 1, 1864, relinquished to the city all the right and title of the United States to the lands within the corporate limits of the city, as defined in the act of incorporation passed by the state legislature, and of course the title of the city to those lands became absolute on that day. *Lynch v. Bernal*, 9 Wall., 316; *Montgomery v. Bevans*, 1 Saw., 653; 13 Stat., 333.

Infancy is not set up in this case, and if it were it could not avail the plaintiffs, as the ninth finding of the court shows that the minor plaintiffs arrived at full age more than a year before the suit was commenced.

Lands lying west of Larkin street and southwest of Johnson street were relinquished to the possessors, subject to the right of the city to take possession of the same if wanted for public purposes, without compensation; but the lot in controversy is not within that reservation, as the first finding of the court shows that it is situated northwest of Johnson street.

Appended to the findings of fact are the conclusions of law pronounced by the circuit court. They are as follows: 1. That the adverse possession of the grantors of the defendants commenced in the spring of 1864, and that the statute of limitations began to run as early at least as the 1st day of July of that year, when the title of the city to the municipal lands within its boundaries became perfect under the act of congress to which reference has already been made.

Authorities to show that the facts stated in the seventh finding of the court amount to an adverse possession of the lot in controversy, within the meaning of the state statute, are quite unnecessary, as the proposition is too plain for argument. *Angell, Limitations* (6th ed.), sec. 394; *Green v. Lister*, 8 Cranch, 229.

§ 844. *What constitutes adverse possession.*

Cases frequently arise where the property is so situated as not to admit of use or residence, and in such cases neither actual occupation, cultivation, nor residence, are absolutely necessary to constitute legal possession, if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Ewing v. Burnet*, 11 Pet., 41 (§§ 837-43, *supra*); *Jackson v. Howe*, 14 Johns., 405; *Arrington v. Liscom*, 34 Cal., 365; *Proprietors of the Kennebec Purchase v. Skinner*, 4 Mass., 416.

§ 845. *Five years' adverse possession, in California, bars an action of ejectment.*

Apply the rule to the case which the foregoing authorities establish, and it is clear that the first conclusion of law adopted by the circuit court is correct, as the seventh finding of facts shows that the defendants, from the date of the act of congress confirming the title of the city to her municipal land to the date of the judgment, were in the actual, peaceable, open, continuous, exclusive and adverse possession of the land, claiming title thereto in good faith against all the world, which is certainly a bar to the plaintiffs' right of action under the statute of the state.

§ 846. *When the statute of limitations begins to run its operation is not suspended by any subsequent disability.*

Nor is there any valid objection to the second conclusion of law adopted by the circuit court, which was that the cause of action having accrued and the statute of limitations having commenced to run during the life-time of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue.

Decided cases of a standard character support that proposition, and the court is of the opinion that it is correct. *Jackson v. Moore*, 13 Johns., 513; *Jackson v. Robins*, 15 id., 169; *S. C.*, 16 id., 537; *Fleming v. Griswold*, 3 Hill (N. Y.), 85; *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.), 319.

When the statute once begins to run, says Angell, it will continue to run without being impeded by any subsequent disability. *Smith v. Hill*, 1 Wils., 134; *Angell, Limitations* (6th ed.), sec. 477; *Currier v. Gale*, 3 Allen (Mass.), 328; *Durouse v. Jones*, 4 T. R., 301; *Jackson v. Wheat*, 18 Johns., 40; *Welden v. Gratz*, 1 Wheat., 292.

Decisive support to the third conclusion of the circuit court is also derived from the authorities cited to sustain the second. Continuous adverse possession of the land, say the court in their third conclusion, having been held by the defendants and their grantors for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, the action is barred, as there was no disability to sue when the cause of action first accrued. Suppose that is so, then clearly the defendants were entitled to judgment, and there is no error in the record.

Judgment affirmed.

GREGG v. FORSYTH.

(24 Howard, 179-183. 1860.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—This was an action of ejectment for a lot of land in the city of Peoria, in the state of Illinois, commenced by the defendant in error against the plaintiffs in error. The title of the plaintiff in the circuit court is shown by a patent of the United States in favor of the legal representatives of Antonie Lapance, who was an inhabitant or settler within the purview of the act of congress approved 3d of March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the state of Illinois," which patent bears date the 1st day of February, 1847, and is founded upon an official survey of the 1st of September, 1840.

§ 847. *State papers published by order of the United States senate are admissible as testimony without further proof.*

The plaintiff deraigned his title from the patentees. In tracing his title he read a document relevant to the cause from a volume of American State Papers, Public Lands, selected and edited under the authority of the senate of the United States, by its secretary, and printed by Duff Green. This was objected to, and the questions reserved by the defendants. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the secretary of the senate, by order of the senate, contain authentic papers which are admissible as testimony without further proof. *Watkins v. Holman*, 16 Pet., 25. The plaintiff read a copy of a deed from

the public records, the original of which was not in the possession of the plaintiff, and which, upon inquiry of the persons with whom it had been deposited, he was informed, had been lost. This testimony authorized the admission of the copy as evidence. The deed in question had been regularly recorded. No suspicion attached to the instrument, and there was no reason to suppose that the better testimony was fraudulently withheld or could have been obtained by further inquiry. *Minor v. Tillotson*, 7 Pet., 99 (Ev., §§ 817-20).

§ 848. *Strangers to a record cannot be heard to object to irregularities in the proceedings to which parties in interest had not objected.*

He also read in evidence a record of a suit of partition in the circuit court of Peoria county, which resulted in a decree of sale of the interests of a number of the parties, under which the plaintiff derived his title as a purchaser. The defendants objected to the record and deed of sale, because the sale had not been conducted with regularity, and the decree of sale had been rendered against infants by default, and because it did not prescribe the manner of the sale. These, with other objections, were properly overruled by the circuit court. The defendants were strangers to these proceedings, and cannot be allowed to object to a result of which the parties to the decree have not complained.

The title of the defendants consisted of a patent from the United States to the defendant Ballance, in January, 1838, for a fractional quarter section of land that includes the lot in controversy, and containing a saving of the rights of any and all persons claiming under the act of congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the state of Illinois." He made proof that he had resided on this quarter since 1844, and had cultivated portions of it for a long time previously, and had before and since that date let other portions of it to tenants, who occupied it under him, and that the particular lot in controversy had been occupied by one of these tenants, who had upon it a distillery. Among other instructions, the defendants requested the court to charge the jury, "that if they should believe from the evidence that said Ballance, being in possession under the title he has exhibited, leased the particular spot of ground in controversy to Almiron S. Cole more than seven years before the commencement of this suit, and that said Cole took possession thereof, and built a steam distillery and other fixtures thereon more than seven years before the commencement of this suit, and that said Cole held possession thereof, and occupied it as a place of business, until he sold said establishment to Sylvanus Thompson, and that Sylvanus Thompson and his son-in-law, Richard Gregg, the defendant, occupied the same until the death of Thompson, and that said Gregg occupied the same until the commencement of this suit, the plaintiff is not entitled to recover in this suit; that it was not necessary for this defense that either the said Cole, Thompson, or Gregg, should have had his dwelling-house on the particular lot; it is sufficient if they lived in the vicinity and occupied the lot in controversy as their place of business." The circuit court refused to give these instructions, but charged the jury "that if Ballance had his house on one part of the quarter, and his improvement extended over and included the lot in controversy, so as to be connected with his residence, and to form part thereof, or it was used in connection therewith, that would, within the meaning of the law, constitute actual residence. If Ballance built on one part of the quarter, and this lot was left vacant and unoccupied and unimproved, that would not, as to that lot, constitute an actual residence.

"If Ballance, his tenants, or those holding under him, actually resided on a lot adjoining lot 63 for seven years immediately preceding the commencement of this suit, and during all that time occupied lot 63 as a place of business, as part and parcel of the premises so resided on by them, that would constitute an actual residence within the meaning of the law, as to this lot in controversy. It is proper for the jury to consider the circumstances of the subdivision of the land into lots and blocks by Ballance, in April, 1846, and whether a severance of the holding as to the particular lots and blocks so subdivided was thereby enacted. When ground is subdivided in that manner under our law, there can be no doubt that different lots and blocks may be so occupied as to constitute an actual residence in them all; but ordinarily, in case of subdivision, the construction of a house on a separate lot or block, and a residence therein, without any connection with adjoining or neighboring lots or blocks, does not constitute an actual residence as to the whole. It is for the jury to determine whether the facts and circumstances stated by the defendant Ballance, or those claiming under him, made them actual residents of the lot in controversy, for seven years before the commencement of this suit. If they did, then the defendants are within the protection of the statute; otherwise not."

§ 849. *A patent to public lands, reserving the rights of persons claiming under certain statutes, conveys a fee-simple title to the patentee. The reservation neither hinders the statute of limitations from running nor creates any fiduciary relations between him and such persons.*

This court, in the cases of *Bryan v. Forsyth*, 19 How., 334, and again in *Meehan v. Forsyth*, at this term, have decided that the saving in the patent under which the defendants claim did not create any fiduciary relation between the claimants under the act of congress of 1823, referred to in it, and the patentee; and that the possession of Ballance, under his patent, was an adverse possession, unless another relation had been created by contract between them subsequently to the issuing of the patent. The present inquiry is, by what evidence must the actual residence on the land be supported to enable the patentee to have the benefit of the act of limitations for seven years? And it has been generally held, that the residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure for him the protection of the act; and that this protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence. *Poage v. Chinn*, 4 Dana (Ky. R.), 50.

§ 850. *Residence upon any part of the legal subdivision of a section conveyed in a patent constitutes possession in the sense of the statute of limitations.*

The case of *Williams v. Ballance*, 23 Ill., 193, involved a controversy similar to that before the court. The inquiry there was as to the validity of the residence and possession of Ballance to support his defense of the statute of limitations, it being the residence and possession established by the testimony in this suit. The supreme court of Illinois inquires whether Ballance occupied the premises described in the patent since 1844, by actual residence thereon. "The fact," says the court, "is that he did, but he did not reside upon every square yard of the premises, nor upon the particular lot. Nor was this necessary. He resided upon the legal subdivision described in the patent, the evidence of his title, and possessed and occupied it by himself and tenants. We think the laying out the land into town lots did not deprive him of the bene-

fits of the statute of limitations of 1835, as to all the fractional quarter, except the particular lot upon which his house stood. He had a right to divide into as many lots or portions or divisions as he pleased, and put a separate tenant on each, and their occupation would be his possession; and the law only required him to possess and reside upon the premises claimed by his title papers, but the law does not say upon what portion he should reside, and, above all, it does not declare that he should reside upon every portion of it." The instructions of the circuit court are inconsistent with the law as thus laid down by the supreme court. In our opinion, the possession established by Ballance in this case was such as placed him under the protection of the statute. Judgment reversed and cause remanded. (a)

BROWN v. LEETE.

(Circuit Court for Nevada: 6 Sawyer, 332-339; 2 Federal Reporter, 440. 1880.)

Opinion by HILLYER, J.

STATEMENT OF FACTS.—This is an action of ejectment for the possession of a narrow strip of land in the southwest quarter of section 1, township 19. Both parties derive title from the United States, and the controversy has reference to the true lines dividing the quarter-section into quarters, in one of its aspects, and in another to the character of the defendant's occupation of the premises in dispute. The defendant claims the disputed territory by virtue of his deed for the southeast quarter of said southwest quarter, and the plaintiff by virtue of his deeds for the other three quarters thereof.

The lines in dispute are the north and west lines of the defendant's southeast quarter. The strip of land in question contains about three acres. The testimony does not establish the position of the original and true boundary lines beyond doubt, but for the purpose of this decision we shall concede that those lines are as claimed by plaintiff, for the reason that we are convinced the defendant has a valid legal title to the land in controversy by operation of the statute of limitations.

Upon that point it appears in evidence that the defendant Leete went into possession of the aforesaid southeast quarter, set up monuments to mark the west and north lines, as he claimed them then to be, in the year 1871. In the year 1873 he set out along this line a hedge, intending and claiming and believing it to be on the true boundary line between his own and the plaintiff's land. In January or February, 1872, the defendant built a fence outside of and five feet from the proposed hedge to protect it. This was a substantial board fence, and has been there ever since. The defendant also set out six hundred and forty shade trees, and altogether had expended on the land in dispute about \$1,700 at the time this suit was begun. In 1871 one Osbiston, then superintendent of the Nevada Land and Mining Company, from which the plaintiff derails title, pointed out the southeast quarter, afterwards purchased by defendant, to him, and advised him to buy it. Defendant did so, and built his hedge and fence while Osbiston remained superintendent, and often passed by and saw the improvements being made by defendant without objection. All the superintendents who succeeded Osbiston were cognizant of the defendant's improvements. They lived near, at the mill of the company,

(a) The same principle was maintained upon similar possession under the same patent to Charles Ballance in *Gregg v. Tesson*, * 1 Black, 150; *Dredge v. Forsyth*, * 2 Black, 563; *Kellogg v. Same*, * 2 Black, 571; *Reynolds v. Same*, * id.

were often seen by Leete, but never made any objection to his improvements. In Leete's deed the land was described according to the government subdivision, and he says that he claimed no other land; that he has never yet discovered that his hedge is not on the true line, and claims it to be so now. The land between the hedge and the fence he never did intend to claim, although since it was built he has exercised control of all within his inclosure. The defendant has been since February, 1872, in the open, peaceable, notorious, exclusive possession of all within the fence, and claiming title and exclusive ownership of all within his hedge. This action was begun in November, 1877, so that the period of five years during which defendant's occupation had continued had fully passed when the complaint was filed and the summons was issued.

§ 851. *A party entering upon land, claiming title thereto by virtue of a deed, and occupying the same adversely and exclusively, gains a perfect title to all of such land, if his possession be continued long enough, lying between the dividing lines marked by him as the true boundaries.*

The plaintiff endeavors to take this case out of the statute, upon the ground that Leete took possession under his deed describing this land as the south-east quarter of the southwest quarter, and, upon his own statement, did not intend to mark off or claim more land than his deed called for. A possession so taken, it is argued, can only be adverse up to the true boundary line, because, as to anything over that, the occupation is by mistake, and not under claim of right. This position will not bear examination, for every act of the defendant in entering and occupying this land was an assertion of title in himself. His actual substantial inclosure of it was, both by the statute of Nevada and the general principles of law, decisive proof of his adverse possession. Comp. L. Nev., secs. 1024, 1026; Ang. on Lim., sec. 395; *Ellicott v. Pearl*, 10 Pet., 412-442. The fence, together with the planting of the hedge and the shade trees, are acts evincing "an intention of asserting ownership and possession," and it is "the intention which guides the entry and fixes its character. *Ewing v. Burnet*, 11 Pet., 41-53 (§§ 837-43, *supra*); *Bradstreet v. Huntington*, 5 id., 410 (§§ 872-82, *infra*); *Ellicott v. Pearl*, *supra*.

Had it appeared by any manifestations on defendant's part, at the time of his entry, that his claim of title was conditional upon the line marked by him being the true line, there would be some support for the plaintiff's position. But the evidence is clear that he marked out the boundary, not as a doubtful one, but as the true one, and all his actions agree with this view. He could not, then, have contemplated the discovery of an error and the future adjustment of the line to correct it. His expenditure of \$1,700 in improving this strip of land is very satisfactory evidence that the line he had marked was then believed by him to be the true one, and that he claimed title up to it. That there was in fact an error made by the defendant when he ran out the line may be true, but having been located as the true boundary, and possession taken, and title claimed to it for five years (the statutory period), that is certainly sufficient to give the possession an adverse character and bar the plaintiff.

"It cannot be disputed," says the supreme court of Pennsylvania, "that an occupation up to a fence for twenty-one years, each party claiming the land on his side as his, gives an incontestable right up to the fence, and equally, whether the fence is precisely on the line or not. It is time that it should be settled beyond dispute that when a person is in possession by a fence as his

line, or by a house or stable, for more than twenty-one years, his possession establishes his right. A possession claiming as his own is in law and reason adverse to all the world, and as much so if he had never heard of an adverse claim as if he had always known of it." *Brown v. McKinney*, 9 Watts, 565. Occupation up to a recognized line for fifteen years would establish it as the division line. *Clark v. Tabor*, 28 Vt., 222; Ang. on Lim., sec. 393.

In many cases where title is gained by adverse possession the entry is founded upon some mistake of fact. Very rarely will it be found that one man has entered on the possession of another knowingly, wilfully intending to usurp the possession and acquire title by lapse of time. One who enters under a void deed and occupies the land, claiming title against the world, possesses adversely, and if he continues in possession the required time will acquire title; yet his whole possession is founded on mistake as to the validity of his deed. If, in such a case, a mistake as to the whole title does not impair the quality of the possession, how can it be said to do so in this case, in which the mistake has been about a small part of the title only? It is true the defendant claimed under his deed, but he also claimed that under that deed he was entitled to hold up to the hedge. His possession was continued for the required time, under a claim of title in fee. He did not take possession admitting the possibility of some mistake, and saying, I only claim to the true line, and if this hedge is not on the true line, I do not claim to it; but he openly claimed the hedge to be the true boundary, and always claimed title up to it as such, exclusive of plaintiff and all others.

The cases relied upon by plaintiff to sustain his position, that if the defendant intended to set his fence on the true line, and it is not so, his possession has not been adverse, all, upon examination, come short of doing it. Expressions can be found in some of the opinions, which, when separated from the context and the facts, give some countenance to the doctrine contended for by plaintiff. But it will be found that the possession which has been held not to be adverse has been taken and kept without an unqualified claim of title. Thus in *Howard v. Reedy*, 29 Ga., 152, it was proved that the defendant had agreed, at one time, within the statutory period, to put his fence upon the true line when he should reset it. The expressions of the court must be read with this fact in view.

§ 852. *The possession requisite to a claim of title must be adverse, notorious, exclusive and long continued.*

So in *Phelps v. Henry*, 15 Ark., 297, the possession which will not ripen into title is said to be one held without title or claim of right, and only in ignorance of the true boundary. Also in *Brown v. Cockerell*, 33 Ala., 38-45, a case as favorable to plaintiff as any cited, the court says in one place: "If a party occupies land up to a certain fence because he believes it to be the true line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting," *i. e.*, claim of title. The intent to claim does not exist, and the claim which is set up is upon condition that the fence is on the true line. This quotation standing alone is seemingly an authority for plaintiff, but further on the court use other language which materially modifies it, for it is said that "possession up to an agreed line is certainly adverse, and the law would be the same if one of the coterminous proprietors should build a fence as the dividing fence, and should occupy with a claim, manifested by words or acts, that such was the line up to which his land extended." So in *Lincoln v. Edgecombe*, 31 Me.,

345, the charge held right was "that if the tenant claimed title to the fence, that would, in connection with the fence, amount to a disseizin; but if it was built by mistake, and if the tenant had not claimed to own beyond the true line, it was no disseizin."

Again, in *Major's Heirs v. Rice*, 57 Mo., 384, the distinction is clearly taken between a conditional and an unconditional possession and claim of title. Thus, although a line may have been established under a mistake of the real facts, says the court: "It is no sort of odds how a line is made, so that it be taken and considered the true line by the adjoining proprietors, and the party possessing up to it claims the land adversely to all others as his own. If he maintains his possession and claim for ten consecutive years, the land becomes his under the statute of limitation by virtue of adverse possession. But where parties assume a line as the true line, but with the understanding all the time that they only claim to the extent of their paper titles and are to relinquish the fenced land if it should turn out to be a mistake, a claim thus conditionally made will not support a plea of the statute."

The supreme court of the United States uses this language: "Wherever the proof is that one in possession holds for himself to the exclusion of all others, this possession must be adverse to all others." *Bradstreet v. Huntington*, 5 Pet., 402, 440 (§§ 872-82, *infra*). And again in *Ewing v. Burnet*, 11 id., 41, 52 (§§ 837-43, *supra*): "It is well settled that to constitute an adverse possession there need not be a fence, building or other improvement made. . . . It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title. . . . Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years with the knowledge of an adverse claimant without interruption, . . . such acts are evidence of an ouster of a former owner and an actual adverse possession against him." The foregoing citations show that the defendant's possession must be regarded as adverse as to all the land inside the hedge, and having been continued uninterruptedly under the eye of the plaintiff and his grantees for more than five years, the right of the plaintiff to maintain this action is barred.

§ 853. *Long continued acquiescence in a dividing line by adjacent land-owners is conclusive against their right of recovery.*

Upon another ground the defendant has a good defense, that is, acquiescence in the location of the division line on the part of plaintiff for more than five years. This defense is entirely distinct from and independent of the statute of limitations. The doctrine in regard to it is thus stated by the supreme court of California: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line." *Sneed v. Osborn*, 25 Cal., 619. That court inclines to the opinion that the time mentioned must at least equal that fixed by the statute of limitations to bar a right of entry, citing *Jackson v. Ogden*, 7 Johns., 238, and numerous other cases.

Acquiescence in an agreed line for more than twenty years is conclusive against a right of recovery. *Boyd v. Graves*, 4 Wheat., 513. And it is held that acquiescence for a great number of years is conclusive evidence of an agreement to that line. No express agreement need be shown. *Rockwell v.*

Adams, 7 Cow., 761. A line which parties have agreed to, either expressly or by acquiescence, will not be disturbed. *McCormick v. Barnum*, 10 Wend., 105. See *Riley v. Griffin*, 16 Ga., 141. Standing by while a party subjected himself to expenses in regard to the land, which he would not have done had not the line been located as it was, may perhaps warrant the presumption of a grant within the statute period. *Adams v. Rockwell*, 16 Wend., 285-302. Long acquiescence in the location of a fence as a dividing line estops the parties from controverting the correctness of the location. *Columbet v. Pacheco*, 48 Cal., 395. The acquiescence in this case has been for more than the period prescribed by the statute of limitations of Nevada, and the plaintiff cannot now question the boundary so long agreed to.

The defendant has never claimed title to the land lying between the hedge and the fence. He says that he claimed title to the hedge as upon the true line, but set the fence a little outside of it as a protection to his hedge. The judgment will have to be in favor of plaintiff for the possession of so much of the land described in the complaint as lies outside of the hedge, and no more.

§ 854. In general.—An entry under color of title by deed is deemed a possession of all the land conveyed, if it be not in any adverse possession. *Brobst v. Brock*, 10 Wall., 519.

§ 855. An entry into possession of a tract of land under a deed containing specific metes and bounds gives constructive possession of the whole tract, if not in adverse possession, though it is not fenced and there is an actual residence only on a part of it. *Ellicott v. Pearl*, 10 Pet., 412.

§ 856. Where there are conflicting claims to land that overlap, constructive possession under the statute of limitations will not extend further than actual possession. *White v. Burnley*, 20 How., 285.

§ 857. A party in possession under a deed for an undivided half is not in adverse possession of the whole. *Noonan v. Lee*, 2 Black, 504.

§ 858. If one enter upon lands, having title, his seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title; but if a man enter without title his seizin is confined to his possession by metes and bounds. An entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin, but an entry into the last parcel in the name of the whole will inure as an entry into the vacant parcel. *Green v. Liter*, 8 Cr., 229.

§ 859. The actual occupation of a part of a tract of land by the owner of the legal title will not give him a constructive actual seizin of the residue of the tract included in document giving him the legal title, that residue being at the time of his entry and occupation in the adverse seizin of another person having an older and better title. *Barr v. Gratz*, 4 Wheat., 213.

§ 860. Occupancy of a part of a tract conveyed by a deed, claiming title to the whole, is possession of the whole. So a jury was charged in an action to recover certain land, title to which the defendants claimed under an unrecorded deed alleged to be lost, parol evidence of the contents being admitted. The plaintiff deraigned title from the United States. *Sackett v. McDonnell*,* 8 Biss., 394.

§ 861. One entering under color of title may claim all the land embraced in his deed, although not actually occupied. So a jury was charged in an action to recover certain real property, commenced in 1871, by one who deraigned title from the United States. Defendants, relying on the statute of limitations, gave in evidence certain defectively executed deeds, and parol evidence tending to prove sales, and claimed, further, to have held adversely for twenty years. *Shuffleton v. Nelson*,* 2 Saw., 541.

§ 862. Continued and uninterrupted possession for twenty years of a part of the land by or for one who holds the legal title perfects the title to the whole body of land within the boundaries of the grant or deed. *Peyton v. Stith*, 5 Pet., 485 (§§ 745-47).

§ 863. One entering into possession under a deed to the whole may hold the whole adversely, although his deed conveys only a part or an undivided share. *Bradstreet v. Huntington*, 5 Pet., 402 (§§ 872-82).

§ 864. The statute of limitations protects a naked possession to the extent of the substantial and actual inclosures. *Harpending v. The Dutch Church*, 16 Pet., 455 (§§ 57-64).

§ 865. Possession for fifty years, though with knowledge of a better title, if adversary, will create a bar under the statute of limitations. *Parthenia Dade* went into possession of certain lands in 1731, claiming up to certain lines. Various suits had been instituted to correct the

supposed error, but Parthenia and those under her continued in possession. An allotment of the lands had been made to Parthenia in 1741, in a partition suit which was subsequently discontinued. The action was brought in 1806 to quiet the title and the plaintiff was held barred. *Alexander v. Pendleton*, 8 Cr., 462 (§§ 888-90).

§ 866. Where a person enters into possession under a recorded deed claiming title to the entirety, and exercises acts of ownership, it is a disseizin of all persons who claim title to the same land to the extent of the boundaries in the deed. *Prescott v. Nevers*, 4 Mason, 826.

5. *Tenants in Common.*

SUMMARY—*Entry of a grantee of one of several co-tenants*, §§ 867, 868.

§ 867. The entry and possession of a grantee of one of several co-tenants under an invalid partition sale is adverse to that of the other co-tenants, and the statute of limitations will run in his favor. In 1806 a patent to certain lands in Kentucky was made to Clymer, Lynch and Blanton, and in 1810 Lynch and Blanton procured a partition to be made by the county court, and one-third of the lands was assigned to Clymer in severalty and the other two-thirds to Lynch and Blanton. The defendants derived their title from the latter, within whose tract their lands are situated. The partition was invalid. *Held*, that sufficient time having elapsed under the statute of limitations, the defendants had acquired a good title. *Clymer v. Dawkins*, §§ 869-71.

§ 868. The possession of the grantee of one tenant in common under a deed purporting to convey the entire fee is adverse to the other tenants in common and the statute of limitations runs in his favor against them. John Bradstreet, by will, devised his property to his two daughters as tenants in common and gave a power of sale to his executor, Philip Schuyler. Martha, one of the daughters, devised a third of her interest to Martha Bradstreet, the plaintiff, and gave a power of sale to her executor, Charles Gould; Schuyler, in 1794, as executor of John Bradstreet, conveyed the lands, including plaintiff's interest, in fee to Agatha Evans, widow, the other daughter of Bradstreet, and one-third in trust to Edward Gould. In 1790 Evans, in her own right, Edward Gould and another, professing to be the attorney of Charles Gould, executor, etc., conveyed the lands to Stephen Potter, under whom defendant claimed. *Held*, that Potter's possession was adverse to all, and, as plaintiff was not under a disability, the statute of limitations created a bar. *Bradstreet v. Huntington*, §§ 872-82.

[NOTES.—See §§ 883-886.]

CLYMER v. DAWKINS.

(3 Howard, 674-690. 1844.)

Prayers and instructions referred to in the opinion.

The plaintiff asked the court to instruct the jury:

1. That if the jury believe from the evidence that the defendants, or others under whom they claim, entered upon the land in contest under the claim of Clymer, Lynch and Blanton for eleven thousand acres, that such of the defendants as the jury may find so entered, by themselves or others under whom they claim, cannot avail themselves of the elder patents read in evidence as to defeat the plaintiff in this action.

2. That the defendants cannot defeat the plaintiff's right to recover, if the jury believe from the evidence the plaintiff ever had right, by reason of the statute of limitation, provided the jury believe from the evidence that the defendants, or those under whom they claim, entered upon the land in contest under the title of Clymer, Lynch and Blanton, for the eleven thousand acres patented to them.

3. That if the jury find from the evidence that any of the defendants entered upon the land in contest, under a parol contract of purchase from the agent of Lynch and Blanton, who were tenants in common with Clymer in the eleven thousand acre patent read in evidence; and the jury also find that such of the defendants as so purchased never notified the patentee, Clymer,

or the trustees named in his will and codicil, or either of them, that they held adversely to Clymer's title, that the defendants as to whom the jury may so find cannot avail themselves of the statute of limitation in defense of this action. Also,

4. That such defendants as the jury may find as above mentioned, if there be any such, cannot avail themselves of the outstanding conflicting elder patents read in evidence, unless the jury further find that such defendants, in the opinion of the jury, have proved a connection with such elder patent or patents by purchase, either made by them or others under whom they claim.

The court refused to give either instruction as asked, but instead thereof gave to the jury the following instruction:

"The court instruct the jury that if they find from the evidence that any of the defendants, or those under whom they claimed, entered upon the parcel of the land in controversy in their possession at the commencement of this action, under a contract, whether it was executed or executory, by parol or in writing, with the agent of Lynch and Blanton, or either of their co-grantees with Clymer, of the eleven thousand acres, by the patent read by plaintiff or any other person claiming under that patent, whereby they purchased an individual two-thirds, or any other such part, and not the entire interest in such parcel or parcels of the land, then such defendants, or those under whom they claimed, and who had so entered, did not, by their entry into the possession, oust Clymer or his devisees of his or their undivided third thereof; but the entry of such purchasers and their possession was for him, Clymer, or his devisees, as well as for themselves; and in the absence of all evidence of notice to Clymer, or those claiming under him, of a subsequent adversary holding by such occupants, their possession did not become adversary, in legal effect, to Clymer or his devisees; and no defendant, who so entered, can now avail himself of the outstanding legal title by the elder patents to be read in evidence; nor can any such defendant prevail in his defense of this action by the length of his possession, and the statute of limitation; nor can any defendant who entered, claiming the entire estate in his parcel of the land, add to the length of his own possession that of any one under whom he claimed and had succeeded, who had so entered under a purchase of an undivided part, and was so a co-tenant with Clymer or his devisees, and thereby make out the twenty years of adversary possession within the statute."

The defendants moved the following instructions, to find as in case of a nonsuit as to all the defendants: That the plaintiff has shown title only to an undivided interest in the land, and that only one-fifteenth. To find in favor of all the defendants whose tenements fall within the elder claims of Tuttle and Howard. To find in favor of all whose possession existed and continued, and have been held as their own, for twenty years before the commencement of this suit. To find in favor of those whose possession existed and continued under Lynch and Blanton, and adverse to Clymer, for twenty years before suit brought. To find in favor of those whose possession originated, and have been held as their own, twenty years before suit brought, under purchases from Lynch and Blanton, or either of them, after the division made under the orders of the Henry county court.

The court refused to give either of the instructions as moved by the defendants, but in substitution therefor gave the following instructions: "The court instruct the jury that their verdict ought to be for each defendant who, or whose predecessor in possession, from whom he had derived his possession and

claim of right, had entered on the land in his possession at the commencement of the action, twenty years before that day, by a purchase and claim thereof in severalty all as his own, and not an undivided part in co-tenancy with Clymer or his devisees, but adversely to him or them, whether such purchase was from Lynch or Taylor, or Lynch and Blanton, or any other who had ever afterwards, up to the commencement of this suit, continued thus to hold such possession."

Opinion by MR. JUSTICE STORY.

This is the case of a writ of error to the circuit court of the district of Kentucky. The original suit was an ejectment for a certain tract of land in Kentucky containing eleven thousand acres; and upon the trial, upon the general issue, a verdict was found for the defendants, upon which judgment passed for them. A bill of exceptions was taken by the plaintiff to the opinions of the court at the trial, and to revise those opinions the present writ of error is brought by the plaintiff.

On the 24th of December, 1806, a patent for the tract of eleven thousand acres of land was granted by the commonwealth of Kentucky unto George Clymer (under whose will the lessors of the plaintiff make claim), one-third, and unto Charles Lynch and John Blanton (under whom the defendants make claim), two-thirds. In the year 1810, if not at an earlier period (for there is some repugnancy in the various dates stated in the record), Lynch and Blanton procured a partition of the tract to be made, by the authority of the county court of Henry, by certain commissioners appointed pursuant to the Kentucky statute of 1792, by which one-third was assigned in severalty to Clymer (he being then a non-resident), by certain metes and bounds; and the remaining two-thirds were assigned to Lynch and Blanton by certain other metes and bounds. The return of the commissioners was filed, acknowledged and admitted to record in the clerk's office of the county of Henry, in 1810; but the court of that county do not seem to have ordered the return to be received and recorded until 1827. How this delay took place has not been satisfactorily explained; and the omission has been insisted upon as an objection to the validity of the partition.

All the defendants appear, from the evidence, to have derived title to the lands in their respective occupation, and to have entered into possession of the same, after the partition was made, and by titles in severalty derived exclusively from or under Lynch or Blanton; and the lands held by them are situate exclusively within the tract assigned by the partition to Lynch and Blanton. The main defense relied upon by the defendants at the trial was an adverse possession to the title of Clymer, during the period prescribed by the statute of limitations of Kentucky. To rebut this defense, the plaintiff insisted that the partition was void, and, being void, the defendants having entered into the land under the patent to Clymer, Lynch and Blanton, who still, notwithstanding the partition, in point of law, remained tenants in common of the land, were not at liberty to set up an adverse possession against that title; nor at liberty to set up any outstanding superior title in any third person, under any elder patent offered in evidence to defeat the plaintiff in the action.

The plaintiff, upon the evidence (which need not be here particularly recited), moved the court to instruct the jury as follows. [See the statement.] The defendants also moved the court to give certain instructions to the jury; which instructions the court refused to give, but gave the following instruction in substitution thereof. [See statement.] To the instructions so refused as

propounded by the plaintiff, and to the several instructions so given by the court, the plaintiff excepted; and the cause stands before us for consideration upon the validity of these exceptions.

§ 869. *The entry of an assignee of a tenant in common under an invalid partition is adverse to the co-tenant.*

The first point made, at the argument for the plaintiff, is as to the validity of the partition under the proceedings in the county of Henry. In our judgment, it is wholly unnecessary to decide whether those proceedings were absolutely void or not; for, assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer was bound, at his peril, to take notice; and as Lynch and Blanton, under those proceedings, claimed an exclusive title to the land assigned to them, adversely to Clymer, if the defendants entered under that exclusive title, the possession must be deemed adverse, in point of law, to that of Clymer.

And this leads us to the consideration of the instructions actually given by the court, which cover the whole ground in controversy, and, if correct in point of law, show that the court rightly refused to give the instructions asked by the plaintiff, so far as they were not consistent with the instructions actually given. It is very clear that the court are not bound to give instructions in the terms required by either party; but it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case, as presented by the parties.

The first instruction given by the court is as favorable to the plaintiff, in all its bearings, as the law either justifies or requires, and is in direct response to the substance of some of the instructions asked by the plaintiff. It, in substance, states that if the defendants entered under the title of Clymer, Lynch and Blanton, as tenants in common, and did not claim any title except to two-thirds of the parcels of land respectively held by them, and not to the entirety thereof, then their entry into the possession did not oust either Clymer or his devisees of his or their undivided third part, and was not adverse thereto; and that the defendants so entering could not avail themselves of the defense of the statute of limitations; and they could not avail themselves of the outstanding legal title of third persons by any elder patent. So far as this instruction goes, it is manifest that it was favorable to the plaintiff; and indeed it is not now *per se* objected to, but the objection is that it does not go far enough, and thus was to the prejudice of the plaintiff.

§ 870. *One tenant in common may enter and oust his co-tenant, but it must be by a notorious overt act of which the co-tenant has notice, and such is a proceeding at law for partition.*

The real point in controversy turns upon the second instruction given by the court in answer to the prayer of the defendants. That instruction, in substance, states that if any of the defendants entered into possession of the lands respectively claimed by them and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not for an undivided part thereof, in co-tenancy with Clymer or his devisees, but adversely to them, then such defendant was entitled to a verdict in his favor, whether he held by a purchase from Lynch or Blanton, or any other person who had ever afterwards, up to the commencement of the suit, continued thus to hold the possession. We see no objection to this instruction, which ought to prevail in favor of the plaintiff; on the contrary, we deem it entirely correct, and consonant to the principles of law upon

this subject. It is true that the entry and possession of one tenant in common of and into the land held in common is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession by the party so entering into possession is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants, and it will afterwards be as operative against them as if the party had entered under an adverse title. Now such a notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenant's purparty under a partition, which, in contemplation of law, is known to the other tenants. Upon so familiar a doctrine it scarcely seems necessary to cite any authorities. So early as *Townsend and Pastor's Case*, 4 Leon., 52, it was holden in the common pleas, by all the justices, that where there are two coparceners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the moiety of such coparcener, which she might lawfully part with, but also the other moiety of the other coparcener, by disseizin. This decision was fully confirmed and acted on, in the recent case of *Doe d. of Reed v. Taylor*, 5 Barn. & Adolph., 575, where the true distinction was stated, that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for the entry generally shall always be taken according to right; yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entirety, would amount to a disseizin of the other parties, whether joint tenants, or tenants in common, or parceners. Upon the same ground, it was held, in New York, in the case of *Jackson v. Smith*, 13 Johns., 406, that a conveyance made by one tenant in common of the entire fee of the land, and an entry and possession by the purchaser under that deed, is an adverse possession to all the other tenants in common. To the same effect is the case of *Bigelow v. Jones*, 10 Pick., 161. The reason of both of these later cases is precisely the same as in the case of a feoffment, the notoriety of the entry and possession, under an adverse title, to the entirety of the land.

§ 871. *The assignee of a tenant in common who claims to hold in severalty under a partition may set up the statute of limitations against the co-tenant of his grantor.*

Similar principles have been repeatedly recognized in this court. In *M'Clung v. Ross*, 5 Wheat., 116, 124, the court said: "That one tenant in common may oust another, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." In the case of *Clarke v. Courtney*, 5 Pet., 319, 354, this court also held that, where a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title. This doctrine is strongly applicable to the possession under the partition in the present case. There are several other cases affirming the same doctrine, and especially *Green v. Lister*, 8 Cranch, 229, 230; *Barr v. Gratz*, 4

Wheat., 213, 223; and *The Society for Propagating the Gospel v. The Town of Pawlet*, 4 Pet., 480, 504, 506 (§§ 611-18, *supra*). The doctrine has been carried by this court one step further; but at the same time one which is entirely consistent with the principles on which the general rule, and the exceptions to it, are founded. In *Blight v. Rochester*, 7 Wheat., 535, 549, 550, it was held that in cases of vendor and purchaser, although the latter claimed his title under or through the former, yet, as between themselves, the possession of the purchaser under the sale, where it was absolute and unconditional, was adverse to that of the vendor, and he might protect that possession by the purchase of any other title, or by insisting upon the invalidity of the title of the vendor, as the foundation of any suit against him. Now, upon this last ground, the defendants were certainly at full liberty as absolute purchasers in fee to maintain their adverse possession to the land, and the bar of the statute of limitations against Lynch and Blanton, and *a fortiori* against Clymer.

Upon the whole we are entirely satisfied that the second instruction given by the court was correct in point of law; and, therefore, the judgment of the circuit court ought to be affirmed, with costs.

BRADSTREET v. HUNTINGTON.

(5 Peters, 402-448. 1831.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The principles of law involved in this cause are few and simple and well established; and all the difficulties consist in so arranging the facts as to apply the principles correctly; or rather, to determine whether they have been correctly applied in the court below. The plaintiff here was plaintiff there, and the action being ejectment, a remedy rigidly legal, it behoved her to make out a title of the same character.

The title made out by the plaintiff consisted, 1. Of a series of documentary and other evidence, received without exception at the trial, which vested in Philip Schuyler an estate, which to all legal intendment was an absolute fee-simple in him and his heirs; without trust, or reservation, or any evidence, intrinsic or extrinsic, of his holding it; or any part of it, in a fiduciary capacity.

2. John Bradstreet's will, dated 23d September, 1773, in which he first devises all his estate to his two daughters in common in fee; and then says, "Notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may conceive to be requisite to the partition of my landed estate; and I devise the same to them as joint tenant, to be by them sold at such time and in such manner as they shall think most for the benefit of my daughters," etc.

3. The will of Martha, one of the daughters of John Bradstreet, under which Martha, the present plaintiff, acquires an interest of one-sixth in John Bradstreet's estate, real and personal. Of this will Sir Charles Gould is appointed sole executor, with power to sell the lands in America, and apply the proceeds to the use of the plaintiff.

4. A deed from Philip Schuyler, dated May 16, 1794, by which, reciting that he is executor of John Bradstreet, he conveys the plaintiff's interest in the subject in controversy to Agatha Evans, widow, the other daughter of John Bradstreet, and Edward Gould naming him attorney of Sir Charles Gould, in

trust to sell and dispose of it, and apply it according to the interest created by the wills of John and Martha Bradstreet.

This deed recites that Philip Schuyler was, at the time of making John Bradstreet's will, and from thence to the decease of John Bradstreet, seized in fee as tenant in common of and in two equal undivided fourth parts of and in all that parcel or certain tract of land, etc. "(being the same of which lot 97 is part and parcel), as to one equal undivided fourth part of which said tract of land the said Philip Schuyler was seized in trust for the said John Bradstreet."

This whole fourth part he conveys to Agatha Evans and Edward Goold, to the use of Agatha, as to two-thirds in fee, and as to the remaining third to the use of Edward Goold, in trust to sell and apply the proceeds as before stated.

The above recital is the only evidence in the cause to show that the conveyance was anything but a mere bounty from Schuyler to these parties. And, notwithstanding that recital, it is perfectly clear that the case makes out the legal estate to have been in him; that the conveyance is a common law conveyance, and operates to convey a legal estate to Mrs. Evans and Goold; as to her two-thirds clearly so, and as to the remaining third equally so, since the fee vested in Goold, and the interest of this plaintiff under that deed is a mere equity.

5. That equity was not turned into a common law right until 1804, when Goold, who survived Agatha Evans, by a deed in which he sets out all the facts on which this plaintiff's equity rested, and among them his character of attorney to Sir Charles Gould, and in compliance with a decree of the court of equity invests her with the legal estate.

The defense set up is adverse possession in Potter, for the double purpose of avoiding Schuyler's deed, and to maintain a bar under the statute. And to maintain this defense, a deed is introduced executed four years prior to that of Schuyler, by which Agatha Evans in her own right, and Edward Goold and another, professing to be attorney to Sir Charles Gould, executor of Martha Bradstreet the elder, convey the lot 97 to Stephen Potter, by words calculated to vest a legal fee-simple, with a general warranty by Evans, and a special covenant against all claiming under John Bradstreet. But in the actual state of the title at that time, in the eye of the common law, this deed conveyed nothing; there was no seizin, actual or constructive; no legal right to possession, nor any remedy except in equity for acquiring a legal estate to the parties who executed this deed.

The bill of exceptions shows that the evidence proved, in substance, that, under this deed and immediately after its execution, Potter entered; and from that time he and those claiming under him have held it as sole and exclusive owners against all the world.

It is not questioned that the plaintiff is within the savings of the statute under a continuing disability, unless the statute began to run as against Schuyler, and with equal reason as against Evans and Goold, Schuyler's grantees, in which case it continued to run so as to bar her. On this state of facts the parties below moved for instructions, and the court gave a charge, and the verdict was rendered for the defendant.

The questions which the court has to consider are: 1. Whether the plaintiff was entitled to the instruction she prayed. 2. Whether there was any error in the instruction as given.

The prayer was a general one, that on the case made out after the whole

evidence and argument were gone through, she was entitled to a verdict. This of course implies that she had made out a good title; and that the defendant had made out no better title nor bar. The words of the prayer are, that the matters and things so given in evidence were conclusive to entitle her to a verdict. From which it follows that if there were a flaw in her title, or that the facts made out a better title in the defendant, or a bar to the action under the statute, the plaintiff was not entitled to this instruction.

The charge admits the validity of the plaintiff's deduction of title, unless interrupted by the invalidity of Schuyler's deed, resulting from an adverse possession in Potter; in which case Edward Goold took nothing, and could transmit nothing to her by his conveyance in 1804. The defendant's case the court puts upon the possession under the statute alone. Now, although the court may have overlooked something in the cause, yet if the consequence is that the charge is more favorable to the plaintiff than it should have been, that is no ground of complaint on her part. And, individually, I think there were some very important views of the case overlooked; views on which I doubt if Lord Coke would have hesitated a moment to decide the better title to be in Potter, independent of the bar.

1. Then I care not, for the purposes of my argument, whether the deed of 1790, to Potter, be regarded as the sole deed of Agatha Evans and her husband, or their joint deed with Edward Goold and Ludlow, attorneys to Sir Charles Gould, or of Sir Charles Gould, executed by his attorneys; either views leads to the same result. But the correct legal view leads more immediately to it; which is that, whether from the absence of proof of the power of attorney, or from an incapacity to delegate his authority, Sir Charles Gould's name must be stricken from the deed. It is the deed of Agatha Evans and husband, conveying, in language the most full and unequivocal, the whole land, and the whole fee in the land. There is not a word in it that can give it the character of a conveyance in severalty, each conveying a distinct interest. And more emphatically so as to Evans, who warrants the whole, and covenants expressly against the plaintiff's title.

§ 872. *A person entering into possession under a void title is a disseizor.*

This, then, is, as to the plaintiff's interest, a conveyance by one having no title to a third person who enters under that conveyance. The fact of Potter's possession is distinctly affirmed, and whether by actual forcible ouster, or by a peaceable possession acquired by fraud, the law holds him to be a disseizor. The first alternative makes him so in terms, and the second is an old but well-settled doctrine. Such is the case, in Rolle's Abridgment, of a husband and wife, joint tenants in fee; the husband commits treason and the king seizes the land. The king cannot be a disseizor; but the lord of whom it was held upon a false suggestion that it is his proper escheat, is put in possession by the king. The lord is adjudged a disseizor as to the joint tenancy of the wife, and the reason assigned is "that he got possession of the freehold by misrepresentation, by injustice and falsehood; that therefore the possession acquired by it must be looked upon as a possession acquired by violence, open and avowed." 1 Rolle's Abr., 658. So, where a guardian in chivalry, having, of course, the possession in him, assigns dower to one as wife of the deceased tenant, who is not wife, and she enters, she is a disseizress; and the reason assigned is that "her possession being acquired by an act of fraud and injustice, the possession acquired by it is tortious." Bro., tit. Disseizin, 7; 1 Rolle's Abr., 662. So also of a possession delivered or permitted under void titles, as

in the case of two infants, joint tenants, and one, being under age, releases to the other, by which the other holds the whole; he is a disseizor, and the reason assigned is "that the title is utterly void." He was not held to be in of the original estate, although a joint tenant, but to have committed a disseizin against the clear state of positive fact, being considered as entering according to the release, not according to the state of actual title after the release was executed, which being void, left the title unaltered. Bro., tit. Disseizin, 19. And the same law was ruled in another case of much the same nature, against the notoriety of an actual feoffment, where the invalidity of the title was combined with a breach of duty, as between guardian and ward.

It is also laid down that if A. executes to B. a lease for the lands of C., and B. enters, this is a disseizin by A., and the reason assigned is that the demise to B. is equivalent to a command to enter the land of C. Bro., tit. Disseizin, 7; 1 Rolle's Abr., 662.

§ 873. *A release by disseizee to disseizor conveys the former's title to the latter, or to his feoffee, and an absolute conveyance to such disseizor or his grantee is such a release.*

At the date of the deed to Potter the legal title was in Schuyler, and he only could be legally disseized. It is not necessary to recur to authority to prove that a release to the disseizor by the disseizee in fee is as good a conveyance as can be executed, or that an absolute conveyance in fee, especially with words of release to a disseizor, is a release to the disseizor or to his feoffee. This last principle is expressly ruled in the case of Jackson and Smith, decided in the New York courts. 13 Johns., 406.

Here, then, we have a conveyance from Schuyler, the disseizee, to Agatha Evans, the disseizress, operating in favor of Potter, her grantee, which makes out a common law conveyance. It is seldom that a case in our time savors so much of the black letter, but the course of decisions in New York renders it unavoidable, and the whole course of this argument has been calculated to involve us in it.

If the conveyance of 1790 to Potter could admit of being considered as only purporting to convey severally the interest of the parties grantors, still we are led to the same result. It must, in that view, be considered as the several conveyance of Sir Charles Gould by Edward Goold and Ludlow, his attorneys. But then it is in the same character, reciting himself such in his indenture, which he is estopped from contradicting, that he receives the conveyance from Schuyler. From this two consequences follow: 1st. That he receives the release from Schuyler in the same right and character in which he conveyed to Potter; and therefore, in point of right as well as form, is the grantor of plaintiff's interest to Potter, and as such the release of Schuyler to him is a release to Potter. 2d. That as it is through him that Mrs. Bradstreet makes title, and his deed contains the same recital, exhibiting him in the character of attorney to Sir Charles Gould, she also is estopped from denying him in that character. In this view, also, then, Potter would hold a good estate at common law.

§ 874. *Disseizee cannot release or convey to a stranger, but can to the disseizor or his feoffee.*

It may be objected that if Schuyler was disseized, so as to invalidate his deed as to the title of the plaintiff, then he was disseized so as to invalidate the deed to the disseizor. But this is not the law; for the principle does not operate as between the disseizor and the disseizee, but only as between the

disseizee and a stranger. So is the common law, and so is the New York decision before alluded to in express terms. *Jackson v. Smith*, 13 Johns., 406. Besides, if void against her, it is immaterial whether void or not against the defendant; her title, then, breaks off midway. Thus far for my individual views.

It is objected to the charge, as it regards the plaintiff's title, that it was incorrect in stating "that the effect of an adverse possession in Potter, at the time of the execution of Schuyler's deed to Evans and Goold, would be to render the deed inoperative and void, and prevent any title from passing under it to Evans and Goold."

If the judge could be considered as having passed upon the sufficiency of the evidence to establish the adverse possession, there might be just grounds of complaint found to this charge; but that question he expressly leaves to the jury, and then it is obvious that, if such be the law of New York, it is idle to go further and inquire whether disseizin and adverse possession be convertible terms at common law, or whether either at this day should invalidate a transfer of property. That an actual or constructive possession is necessary at common law to a transmission of right is incontrovertible. It is seen in the English doctrine of the necessity of an heir's entering in order to transmit to his heirs; but whatever be the English doctrine and that of other states, as to the right of election to stand disseized or not, it is certain that the New York courts have denied that right, both as to devises and common law conveyances, without the aid of a statute repealing the common law.

After the case of *Jackson and Demont*, 9 Johns., 55, it is in vain to contest the point, and the principle is established by various other cases. It was then incontrovertible in that state, that if the jury found an adverse possession (for such is the language of the New York cases, not actual ouster or disseizin), the conveyance was void, and such was the charge of the judge.

§ 875. *The deed of a disseizee is void. His freehold is converted into a right of action.*

It seems to have been supposed, in the argument, that the judge founded his instructions on this point upon the statutes of maintenance. This, however, is not the fact, for it will be seen in the case of *Jackson and Demont* that the courts of that state go upon a principle having no relation whatever to the statute of maintenance. They apply to adverse possession the common law doctrine on the effect of disseizin, according to which the deed of one disseized of his freehold is held to be utterly void. His freehold was then held to be out of him, to be converted into a right of entry or right of action, and, as such, no more the subject of legal transfer at common law than an ordinary *chose in action*. It being so settled in New York, it is in vain to inquire further; but, *en passant*, it may be observed that there are few principles of more ancient or more dignified origin. It is the law of kings that the fact of possession proves the right of possession; and the idea is thrown out by Blackstone that it probably passed down from greater to less until it extended to every man's close.

There are, however, less questionable reasons for it to be found in the practice and policy of the feudal and common law. But the charge is said to be erroneous in those passages which relate to the bar of the statute.

There is something unique in the form of this bill of exceptions, since, after setting out the facts, it gives us the arguments of counsel, instead of prayers for specific instructions, and contains but one prayer on each side, each for a

general instruction in the party's favor; so that we have to examine this instruction as rendered, and reduce it from generals into particulars by reference to the evidence, perhaps aided by the specific propositions exhibited by the arguments.

The instruction, then, commences by admitting hypothetically that the deduction of title to the plaintiff was complete; and that the deed from Agatha Evans and Ludlow and Goold to Potter was void as to conveying away the interest of the plaintiffs; "yet," the judge affirms, "there is nothing appearing on the face of this deed (*i. e.*, the deed to Potter), nor anything in the circumstances connected with its execution, as far as they had been shown, which in law would preclude the defendant from availing himself of possession under it, as a bar to the plaintiff's action, or prevent the possession of the said Stephen Potter, taken under and in virtue of the said deed, from being considered adverse to the title of the lessor of the plaintiff, and to the title of the said Philip Schuyler, the executor and trustee of the said John Bradstreet; provided the proof was sufficient in other respects to establish the fact of such adverse possession." And again: "That although it was generally true that one tenant in common was not permitted to set up his possession as adverse to his co-tenant, yet, that one entering into possession of land, under a deed for the whole, and claiming the entire interest, would not be thus precluded, although it should subsequently appear that such deed conveyed an undivided share." It then goes on to state that the judge, "after explaining to the jury what in law constitutes an adverse possession, and submitting to them, as a question of fact, whether such a possession had been proved, directed them," etc. And finally the judge instructed the jury that "the question whether or not it was competent for the defendant to set up the defense of adverse possession under the deed to Stephen Potter was a question of law, and had been decided against the plaintiff; that what in law constitutes an adverse possession was also a question of law; and that it was for the jury to say, under the instructions that had already been given to them upon that point, whether such possession had been proved; that if they believed from the evidence that such a possession had been established they were bound to find a verdict in favor of the defendant."

Some difficulties were presented in the argument as to the effect to be given to the words "after explaining to the jury what in law constitutes an adverse possession." But it must always be recollected that this court can only reverse a judgment when it is shown that the court below has erred. It cannot, then, proceed upon conjecture as to what the court below may have laid down for law; it must be shown, in order to be judged, what instructions were in fact given and what were refused. The passage alluded to can only be held to affirm what it expresses, to wit, "that the judge instructed the jury as to what in law constitutes an adverse possession." And in doing so certainly there was no error. Adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is therefore correctly laid down to be a question of law. The whole argument in this case proves it.

The whole purport of this part of the charge, then, reduced to its elements with reference to the points in argument, is this: 1. That adverse possession is a question of law, on which the court has a right to instruct the jury. 2. That the fact of adverse possession, in its legal sense, was a question for the jury.

§ 876. *An adverse possession may be set up wherever it exists, either to support a title by the statute of limitations or show the nullity of the conveyance of a party out of possession.*

3. That the defendant in this case was not precluded from setting up an adverse possession, whether we regard him in the character of one holding under a void deed, or of a trustee or *cestui qui trust*, or of a tenant in common, or of one holding the same, or by the same title. Or, in more unequivocal terms, that an adverse possession, where it actually exists, may be set up against any title whatsoever; either to make out a title under the act of limitations, or to show the nullity of a conveyance executed by one out of possession.

On the first two of these propositions there can be no doubt, and none has been expressed; and as to the third, it is equally clear that disseizin or adverse possession, as a fact, is always a possible thing, and may occur wherever force may be applied. The common law, generally speaking, regards it as an act of force, and always as a tortious act; and yet, out of regard to having a tenant to the precipe and one promptly to do service to the lord, attaches to it a variety of legal rights and incidents. Rights accruing under acts of limitations are recognized, in terms, as *prima facie* originating in wrong, although really among the best protections of right; and if any one who can commit a disseizin may claim under an adverse possession, it is not easy to preclude any one. An infant, a *feme covert*, a joint tenant in common, a guardian, and even one getting possession by fraud, may be a disseizor. 1 Rolle's Abr., 658, 662; Bro., tit. Disseizor, 7; Salkeld, Joint Tenant, and Tenant in Common.

The whole of this doctrine is summed up in very few words, as laid down by Lord Coke [1 Inst., 153]; and recognized in terms in the case of Blunden and Baugh, 3 Croke, 302, in which it underwent very great consideration. Lord Coke says: "A disseizin is when one enters intending to usurp the possession and to oust another of his freehold; and therefore *querendum est a judice quo animo hoc fecerit*, why he entered and intruded." So the whole inquiry is reduced to the fact of entering, and the intention to usurp possession. These are the elements of actual disseizin; and yet we have seen that one may become a disseizor, though entering peaceably under a void deed, or a void feoffment, or by fraud; and that the intention to disseize may, under circumstances, be imputed to those who by a general rule of law are in ordinary cases incapable of willing, or not bound by an exercise of the will. This analogy has been freely extended to adverse possession, and even gone beyond it, as well by the decisions of New York, as will hereafter appear, as by the repeated ruling of this court.

§ 877. *A possession may be adverse wherever an ouster may be presumed. One tenant in common may oust his co-tenant and hold adversely.*

In the case of *The Society for the Propagation, etc., v. Pawlet et al.*, 4 Pet., 504 (§§ 611-18, *supra*), it is distinctly intimated, that a possession may be adverse wherever an ouster may be presumed; and also unanimously ruled, that it may be adverse, and maintain a bar under the statute, even where ouster is in terms repelled, and not to be presumed from the very circumstances of the case. The words of the court are, "a vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor. Such was the doctrine of this court in *Blight v. Rochester*, 7 Wheat., 535." If this be

the correct doctrine of this court, and there can be no doubt it is, it seems to follow that wherever the proof is, that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to others. Such certainly is the view taken of the law in the reasoning of this court in the case of *Willison v. Watkins*, 3 Pet., 53; and with express reference to lessors, mortgagors, trustees, and tenants in common. In the case of *M'Clung v. Ross*, 5 Wheat., 116, the chief justice says: "That one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act that can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. The principles laid down in *Barr v. Gratz*, 4 Wheat., 213, apply to this case." This is perfectly consistent with the language of the case of the town of Pawlet; for the fact to be determined is, whether the party holds possession for himself or for another; and this can only be determined by evidence, or circumstances to prove the one or the other. It is the inquiry into the *quo animo*. In all these cases there is no intimation found that the adverse possession may not be set up; the only point maintained is that the *quo animo* must be established, as well as the fact. But in finding the *quo animo*, the jury must of course be left to their own view of the effect and sufficiency of the evidence. Actual ouster is clearly not requisite, either to be presumed or proved; adverse possession may exist without it; and notice, as a fact, may clearly be deduced from circumstances as well as be positively proved.

The bill of exceptions states that the defendant proved (that is the word used) that Potter, 1. Entered under his deed and by virtue thereof. 2. Immediately after the execution thereof. 3. Claiming to be sole and exclusive owner thereof; and in a subsequent part is amplified by the expressions, claiming the absolute ownership, and the ownership in fee.

Much of the discussion has turned upon the sufficiency of proof to the effect stated to sustain the finding of an adverse possession; and it has been insisted that it neither supplies the exigency of actual ouster or notice. The only prayer of the plaintiff, it will be recollected, is for a general instruction in her favor, "upon the matter so produced and given in evidence in her behalf."

The court were, therefore, not called upon by the plaintiff to instruct the jury upon the competency of this evidence to sustain a finding of adverse possession; and accordingly gave none, unless it was incidentally; and if, therefore, the evidence was insufficient, it could only be the ground of a motion for a new trial, with which we have no concern.

§ 878. *Adverse possession defined.*

The views which I have taken of the doctrine of adverse possession would not have been necessary but for the supposed bearing of the instructions actually given by the court upon the verdict, and particularly in relation, 1. To that part of the bill of exceptions in which it is said "that the court explained to the jury what in law constitutes an "adverse possession;" which if correctly explained, it is supposed, could not have sanctioned the verdict upon that evidence. But on this it must be observed that, in a case where the *quo animo* alone, with which a defendant entered and held, was the question, and the proof was that he entered and held to be the sole and exclusive owner of the land, and to hold an absolute ownership in fee, if ouster and notice like other facts may be presumed from long and undisturbed possession, or other

circumstances, it would be difficult to say that the testimony in this cause was not competent to sustain a finding of an adverse possession. It is impossible, upon this view of the case, to impute to the court any other instructions than what may be covered by the terms of the proof in the case; that is, that if the judge instructed the jury "that one who enters under a deed purporting to convey to him an estate in fee, claiming to be sole, and exclusive, and absolute owner in fee thereof, for forty years, may be regarded as holding adverse to all the world," it would be difficult to find any legal exception to such a charge; since it is left open to the jury to judge of the sufficiency of the evidence to prove the fact of a claiming to be sole, and exclusive, and absolute owner in fee. Notice and actual ouster are among the most direct and ordinary proofs of such a holding, and may have been the proved or presumed ground of this verdict.

2. These views taken of the law of adverse possession were necessary to precede an analysis of the general instruction given by the court upon the competency of the bar under the statute.

On this instruction it is necessary to bear in mind that it is strictly confined to this: 1. That there is nothing on the face of the deed under which Potter claims that precludes him from setting up this bar. 2. That there was nothing in the circumstances connected with its execution that would preclude him. 3. That there is nothing in the possession acquired under that deed to prevent the possession acquired under it from being held adverse to the lessor of the plaintiff, or to Schuyler, provided the proof was sufficient in other respects to establish the fact of adverse possession. There is no affirmation by the court of the sufficiency of that deed to constitute an adverse possession, or of the sufficiency of the possession acquired under it. But all the court becomes responsible for is the negative proposition that there is nothing in the deed, or in the circumstances attending its execution, which precludes the defendant from setting up and proving adverse possession.

Now it is difficult to see how this proposition can be controverted. If, in the very nature of things, there is no one who may not be actually ousted and actually held out of possession, whether lessor, mortgagor, trustee, or tenant in common, as is affirmed in the case of *Willison v. Watkins*, and other cases, how is it possible that any deed or any circumstance should preclude a resort to proof of absolute adverse possession, where it exists in fact? The charge of the court amounts to no more than a limited affirmance of that general proposition.

§ 879. *One entering into possession under a deed to the whole may hold adversely, although it turns out that his deed conveys only a part or an undivided share.*

But as the chief difficulty in the cause arises out of that specification under the general proposition which relates particularly to a tenancy in common, we will consider that with due attention. The instruction of the court is: "That although it is generally true that one tenant in common was not permitted to set up his possession as adverse to the title of his co-tenant, yet that one entering into possession of land under such a deed for the whole, and claiming the entire interest, would not be thus precluded, although it should subsequently appear that such deed conveyed only an undivided share." The words "thus precluded" have reference to the same terms used in the general instruction, and make this part of it to mean "that one tenant in common entering into possession of land under a deed for the whole, and claiming the

entire interest, would not be precluded from setting up an adverse possession, provided the proof was sufficient in other respects to establish the fact of such adverse possession."

And where is the objection to such an instruction? If one tenant in common may be disseized by another, if one tenant in common may set up an adverse possession against his co-tenant, provided he has adequate proof of the fact of its adversary character, it would seem that this instruction imports no more.

On this part of the case, however, there exists a division of opinion on the construction of the charge, three of the judges thinking that it falls short of the proposition as I have stated it, and two others concurring in my view of its construction. In support of the construction, which those who concur with me adopt, I have further to remark:

1. That the court below might very well have withheld this instruction, since, in fact, there is no legal tenancy in common in the case. The action of ejectment deals altogether with legal estates. Mere equities are unknown to it; and yet the tenancy in common set up in this case is altogether destitute of a legal character. At no time had the plaintiff's lessor a scintilla of right, known to the common law, until she received the deed of 1804. Until that time the only estate that can be recognized in this form of action was in Schuyler, or in Evans and Goold; if not, in the defendant Potter, as has before been noticed. It surely cannot be contended that Potter held as tenant in common with Goold, since Goold, either in his own right as assuming a false character, or in the right of Sir Charles Gould, as having acted in his true one, was one of the grantors under whom and against whom Potter entered.

§ 880. *The grantee of the whole by one tenant in common can hold the entire estate adversely.*

2. There was no tenancy in common, because Potter entered in fact in his own right, under a deed conveying a fee-simple in the entirety. Such it is as to the act of Evans and wife, and such it purports to be as to the act of Edward Goold, or of Sir Charles Gould. It has been earnestly insisted that the entry of Potter under that deed must be presumed to be according to the title actually acquired under it, supposing it to be void as to Sir Charles Gould, and not according to the estate which it purports to convey. But to this there are several answers, and the first alone is conclusive, to wit, that the evidence expressly repels the presumption. He entered under that deed as the sole, exclusive, absolute owner in fee. This is altogether inconsistent with an entry to the use of himself and another. And this seems to be no longer an open question in New York, even on the subject of legal inference. For in the case of *Jackson v. Smith*, 13 Johns., 406, which was the case where one tenant in common conveyed the whole, and this very point was made, the court repels the inference in favor of the entry as tenant in common, and declares the contrary to be the proper inference. And in the case of *Clapp v. Bromagham*, 9 Cowen, 551, 552, 553, which was another case of a conveyance of the whole by one tenant in common, the same doctrine is repeated in terms. That part of this bill of exceptions which relates to the proof seems to have been nearly copied from the case of *Clapp v. Bromagham*, in which the bill of exceptions stated that the defendant entered as purchaser of the whole, and held as tenant in severalty, claiming to be sole and exclusive owner.

Again, although it were the true inference of law, nothing can be clearer

than that it might be repelled by proof, and that the jury might well find the contrary to be the fact. Their verdict in this case is equivalent to such a finding; and for aught that we can judicially know, such a finding may have been sustained by proof of ouster, notice, forcible repulsion, leasing and receiving rents, or any other competent proof of the character of his entry and the assertion of rights under it.

3. If there was a tenancy in common the law appears to be definitely settled in New York that the grantee of one tenant in common for the whole, entering on such conveyance, and holding as sole owner, may set up the statute against his co-tenants in common. And to this effect we have before us an adjudged case, in which there seems to have been neither an actual ouster nor actual or constructive notice to the co-tenants. This is the case of *Clapp v. Brom-ugham*, decided in 1827, and before referred to for another purpose; in which one of nine tenants in common sold the whole premises to the defendant, who entered and held as his sole and exclusive property. It is distinctly shown by the court that the only question in that case was whether the defendant might set up his possession, to the exclusion of his co-tenants, and decided that he might, upon the most elaborate argument and profound examination.

In that case the decision of this court in the case of *Ricard v. Williams* is cited (7 Wheat., 60), and recognized as laying down the true principle by which this class of cases must be governed, to wit, that, in the absence of all controlling circumstances to the contrary, the entry of one having right shall be held to be according to that right; that an ouster or disseizin is not to be presumed from the mere fact of sole possession; but that "it may be proved by such possession," accompanied by a notorious claim of an exclusive right. This decision, according to our view of it, leaves no scope for speculation.

4. On the subject of this equitable tenancy in common, against which we must again enter our protest as a *novus hospes* in the action of ejectment, it may be further remarked, that if it is to be regarded in our deliberations on the law of the case, it is to be presumed that it must be treated as if we were sitting in a court of equity, and then it would certainly be appropriate to examine it in all its equitable aspects.

And first, is the deed to Potter to be regarded as the deed of Sir Charles Gould, or is it not? If not, then clearly Potter is not to be affected by any equity which Mrs. Bradstreet might set up against Sir Charles Gould. If it is to be considered his deed, then other equitable considerations present themselves. It is his deed, executed by his attorney, Edward Goold. But Mrs. Bradstreet also makes title through Edward Goold, naming himself attorney to Sir Charles Gould, and reciting that as his character in conveying to her.

Then, if Potter is to be affected with equitable notice or equitable duties as being his substitute, why is not Mrs. Bradstreet to be similarly affected in the character of his alienee or substitute? If so, she is bound to do whatever Potter might in equity have claimed of Edward Goold, and that is a conveyance in fee, in severalty, of the land in question. But I repeat, this is involving the action of ejectment in subtleties that are unknown to it.

§ 881. *Adverse possession may be held under an entry made by virtue of a void title.*

5. But it is insisted that though the point of tenancy in common be got over, there are others in the case that are to be removed, and 1. That as there is no proof of the power from Sir Charles Gould to Ludlow and Goold, the deed

to Potter places him, as to the interest of Mrs. Bradstreet, in the relation of one having no title or a void title.

As to an entry under a void title, that has met with such pointed answers from this court and the courts of New York that it can scarcely require a labored examination. The bar of the statute is acknowledged to originate in wrong. In the case of *La Franboise*, 8 Cowen, 594, 596, the supreme court of New York say, "that if a party have a deed he need not produce it, and if on production it proves defective, that does not affect the character of the possession." And when the court of errors come to examine that doctrine, they affirm it in more general and emphatic language. The only case which suggests a doubt as to its applicability is that of *Jackson v. Waters*, 12 Johns., 365, decided in the same courts. But, though that case be not shaken by subsequent decisions, it is enough to observe of it that it had its origin in a peculiar policy, or rather in the common law principle that the king cannot be disseized or be a disseizor. It was the case of a Canadian grant conflicting with a New York grant; and the case of *Clapp v. Bromagham*, as well as other adjudged cases, show that, as between parties to mesne conveyances, the principle ceases to apply. Thus, though the king cannot be a disseizor, his grantee shall be held such; and the reason given is, "because he has time and leisure to inquire into the legality of his title, which the king is supposed to want leisure for." Bro., tit. Disseizin, 65. ~

6. It is further urged that the bar is set up against the same title, and therefore incompetent. But this reason has been repeatedly disposed of by this court, and most recently in the case of the town of Pawlet, in which it is ruled that it is no objection to setting up a possession as adverse. The passage has been already in part quoted.

7. That the deed of 1790 places Potter either in the relation of Sir Charles Gould, who was trustee to Mrs. Bradstreet, or of Mrs. Bradstreet, who was *cestui que trust*. But this admits of two answers: either the deed as to her was void, or it was not. If not, it destroys her interest by an effectual transfer to Potter; and if it was void, then it could not create the relation contended for. If the confirmation through the deed of Schuyler is resorted to, then the answer is still more complete, for that deed expressly recognizes the right to sell; and if it does put Potter upon inquiry, the result is that he might fairly and honestly acquire a complete title by sale, discharged of her equity, since either Schuyler or Gould might sell consistently with the trust. So that he may have taken a void title from one or the other. But the integrity of his conduct in taking it is such that no principle of equity can make him either trustee or *cestui que trust* under either the original or confirmatory deed. He may have been ill advised in a legal point of view in taking the one or the other title; but if there is no immoral act on his part, merely taking a void deed will not make him a trustee, nor taking an effectual deed from one who has the power to sell and is expressly charged to sell for the benefit of plaintiff. He is not to be affected by the fraud of the trustee when he so clearly appears to have acted innocently and in good faith.

If, in taking a title of the whole from Evans and wife, he has in fact taken a void title from them for Mrs. Bradstreet's interest, he has a right to put himself upon his wrong, and if he has proved an actual adverse possession under it, he has a right to the benefit of his bar. The Evanses never were trustees to Mrs. Bradstreet, neither under any of the wills or under Schuyler's

deed. Edward Goold alone was the trustee for her under the latter, legally in his own right, equitably as attorney to Sir Charles Gould.

No fiduciary relation, therefore, is imputable to Potter as claiming under the Evanses, because they themselves were never affected with the character of trustees, and not through Goold, because his deed, if good, was absolute against the plaintiff, and if bad, conveyed nothing to Potter.

§ 882. *One may hold adversely to him from whom he purchases, and the statute begins to run from the date of the purchase.*

If the attempt is to impute to Potter the relation of trustee, because Schuyler was trustee, and he claims through or under Schuyler, the answer is, that if his paper title, as it is termed, is the subject to be considered, then he claims from Schuyler through Evans and Goold; and as Goold had the legal estate in him, so must Potter have; and Mrs. Bradstreet must seek her redress in equity. Against Goold, at law, she certainly could not recover. But even in equity, how would her right stand? A sale by Goold was perfectly consistent with the trust for her benefit; and considering the *bona fide* character of Potter's purchase, I can see no ground for granting her relief as against him. Notice of her equity, without fraud or collusion, can afford none; since notice of the right in her trustee to sell must accompany it, or rather is a part of it. If the subject of inquiry, as it relates to Schuyler, is respecting the maintenance of Potter's bar, then he need not assert his possession as adverse to Schuyler; it is enough for his purpose, if adverse to Evans, or Evans and Goold; and that it might well be so held, although he claims under them, has been, as we have seen, distinctly and repeatedly laid down in this court. If it began to run against them, it continued for the necessary length of time.

That one may hold adversely to him from whom he purchases has long been settled, both in this court and in the courts of the states of the United States; the fact of possession and the *quo animo* being still the legal subjects of inquiry.

8. It has been argued that whatever may be the rule in ordinary cases, in this the proof of notice was indispensable, since these lands were wild or waste lands, notoriously uninhabited, and mere possession of which was not enough to put the trustee or co-tenants upon their remedy.

To this it may be answered that, for anything appearing in the bill of exceptions, the lands may not have been waste or wild; and the proof of Potter's entering immediately and claiming to be sole and exclusive owner would seem to repel the fact.

But the true answer is the general one, which was before given on the subject of notice, that we know not but proof of notice or presumption of notice may have been the grounds on which the jury found their verdict. As a proof of a "claiming to be sole and exclusively owner," it was an adequate and natural ground; and certainly as a fact may have been inferred from length of possession, and other circumstantial evidence, of the weight of which they must be the judges.

Judgment affirmed, with costs.

§ 883. *In general.*—One tenant in common may oust his co-tenant and hold in severalty, but a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, will not constitute an adverse possession. Hackett and Ross were tenants in common, and the defendant, McClung, claimed under a deed from Ross' grantor. Subsequent to Ross' deed one John Meriott had taken possession, in 1807, as

tenant of Hackett and M'Clung, and built a house and cleared several acres of the land. In the autumn of 1808 he surrendered possession to Hackett, who resided there until his death. It was maintained that the possession of Hackett and Meriott operated as an ouster of Ross, but it was held otherwise. *M'Clung v. Ross*,* 5 Wheat., 116.

§ 884. A refusal by one joint tenant or tenant in common to allow his co-tenant to come in or to participate in the enjoyment of the common property is equivalent to an ouster, and gives rise to an adverse possession. *Roberts v. Moore*,* 3 Wall. Jr., 292.

§ 885. It seems that one tenant in common may hold adversely to another. So held in a suit in equity to recover an interest in certain lands in Ohio. The plaintiff claimed as heir of Stephen Scott, who was entitled to the land. The defendant claimed under John Graham, who located the land and obtained a patent for it in 1800. Graham claimed under an assignment from complainant's mother, made in 1787, while he was a minor, without notice of the invalidity of the assignment, and had been in peaceable possession since 1801. The plaintiff claimed that the defendant was his co-tenant. The bill was dismissed. *Scott v. Evans*,* 1 McL., 486.

§ 886. One tenant in common may disseize another, and if a person enter into possession claiming title to the entirety under a deed, and the title turns out to be defective as to a moiety, it is a disseizin of the parties entitled to that moiety.. *Prescott v. Nevers*, 4 Mason, 326.

6. Tacking Possession.

SUMMARY—*Purchaser without notice; secret trust*, § 887.

§ 887. A purchaser without notice may attach to his possession that of his grantor, free of a secret trust, in order to create a bar under the statute of limitations. Possession for fifty years, though with knowledge of a better title, if adversary, will create a bar under the statute. *Alexander v. Pendleton*, §§ 888-90.

[NOTES.— See §§ 891-899.]

ALEXANDER v. PENDLETON.

(8 Cranch, 462-470. 1814.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought in the year 1806, in the circuit court for the county of Alexandria, for the purpose of quieting the title of Nathaniel Pendleton, the plaintiff in that court, to eighty-three acres of land contiguous to the town of Alexandria which have been in his possession, and in the possession of those under whom he claims, from the year 1732 to the present time.

Robert Alexander, being seized of a large tract, on part of which the town of Alexandria now stands, on the 17th of January, in the year 1731-2, executed to Dade Massey, then about to intermarry with his daughter, Parthenia Alexander, his bond in the penalty of 800*l.*, with a condition that he would convey to his daughter Parthenia and her heirs, on demand, four hundred acres of land lying on Potomac, "beginning on the river side and from thence running to his back line, making a long square so as to have the same breadth on the river as on the back line."

The marriage soon afterwards took effect and she was put into possession of the land by the following bounds, that is to say: "Beginning at the mouth of Goings Gut, on the River Potomac, and extending down the river so as to include four hundred acres of land between the river and back line."

The back line called for in the patent was a due north course; that by which Robert Alexander then held was north six west. Claims have been since successfully asserted which would vary the back line so as to run north seventeen west. The appellants insist that those who hold under Parthenia

shall be compelled to extend to the back line as now established, and proportionably to contract their line down the river, so that the parallelogram shall still comprise four hundred acres. Pendleton, who is a purchaser under Parthenia, insists on being limited on the west by the line north six west, which was the back line when the title of Parthenia accrued.

In the year 1735 Robert Alexander departed this life, having first made his last will, in which he devised as follows: "Item, I give to my daughter Parthenia Massey four hundred acres in Prince William county, according to my bond. Item, I give to my daughter Sarah Alexander four hundred acres joining Parthenia Massey, the same length on the back line and the same breadth on the river."

Parthenia survived her husband, Dade Massey, and intermarried with Townshend Dade. Sarah intermarried with Baldwin Dade, and was put into possession of the land devised to her.

John and Gerard Alexander were the only sons of Robert and were the co-devisees of the bulk of his estate. In April, 1740, John instituted a suit against Gerard for partition; and to this suit Townshend Dade and Parthenia, his wife, and Baldwin Dade and Sarah, his wife, were parties defendants. A decree of partition was made, directing that the lands of the Dades also should be allotted to them to be held in severalty. Commissioners were appointed to execute this decree, with directions to report their proceedings to the court.

Under this interlocutory decree the land was surveyed by Joseph Berry and a division made. Four hundred acres were allotted to Townshend Dade and Parthenia, his wife, and the same quantity to Baldwin Dade and Sarah, his wife. This allotment was made on the idea that north six west was the true back line. But as the Alexanders intended to institute suits for the purpose of recovering lands lying west of the north six line, it was agreed between all the parties that the partition then made should not be conclusive, but should depend on the suits about to be instituted. In consequence, as is presumed, of this verbal agreement, the survey and proceedings under this interlocutory decree were not returned; and in May, 1741, the suit was dismissed agreed.

Townshend Dade and Parthenia, his wife, remained in quiet possession of the four hundred acres devised to Parthenia by her father, according to those boundaries which had been marked out on the idea that north six west was the true back line.

Sarah Dade died without issue; on which event her land was limited to her two brothers John and Gerard, who entered thereon and continued to hold it according to Berry's survey.

John Carlyle claimed the land west of north six west; and, in April, 1766, commenced an ejectment against Alexander, who appears to have recovered part of the land between north six and north seventeen west in a previous ejectment against one of his tenants. In May, 1771, a verdict and judgment were rendered in his favor.

In the year 1774 Townshend Dade and Parthenia, his wife, instituted a suit against John Alexander for a title to the land mentioned in the bond of Robert Alexander. To this suit John Alexander filed his answer, stating the death of Dade Massey, leaving a son by Parthenia, her subsequent marriage with Townshend Dade, and the doubt who was entitled to the land, as the reasons for its not having been previously conveyed.

In the same year, Charles Alexander, son and heir of John, filed his answer, in which he states the doubt respecting the back line, admits the north six west

to be the present back line, and prays that, should a more western boundary be at any time established, he and his heirs might be at liberty to vary the boundaries of Parthenia's land so as to conform to such future back line.

In 1776 a deed was executed by Charles Alexander to Parthenia Dade, conveying four hundred acres of land according to the bond of Robert Alexander. This deed specifies no boundaries, and contains no stipulation respecting the future change of the back line. It would confirm the will of Robert Alexander, if that will wanted confirmation. In the year 1779 this suit was dismissed, neither party appearing.

In May, 1778, Parthenia Dade conveyed this tract of land, with no other description of the metes and bounds than was expressed in the bond and will of her father, to William Hartshorne, who took possession of the land, and held it according to Berry's survey, which makes north six west the back line.

William Hartshorne laid off the northern part of the tract from the river to north six west in twenty-three lots, which he sold to various persons; and then, in May, 1779, conveyed the residue of the land, which includes that in controversy, to William Harman, of Pennsylvania, by metes and bounds, taking north six west to be the true back line.

In the year 1786 Mordecai Lewis, executor of William Harman, conveyed this land to Elisha Cullen Dick, who, in 1796, conveyed eighty-three acres, the land now in dispute, to Henry Lee, who, in June, 1797, conveyed to Baldwin Dade, who, on the 29th day of December, in the year 1801, conveyed to Philip Fitzhugh, who, on the 18th of February, 1802, conveyed to Nathaniel Pendleton. In the same deed Fitzhugh conveys also to Pendleton three acres of land, other part of the tract of four hundred acres, with notice that Charles Alexander claims north seventeen west as the back line.

Previous to the conveyance from Baldwin Dade to Philip Fitzhugh, the said Dade had conveyed the land in controversy to Thomas Swan, to secure a debt due to William Hodgson. Swan conveyed to William B. Page, in trust for Hodgson, who conveyed to Hodgson, who, in July, 1803, conveyed to Pendleton.

Soon after the decision in favor of Carlyle in May, 1771, Charles Alexander brought an ejectment for the same lands, and in 1790 a verdict was given in his favor, on which a judgment was rendered, which was affirmed on appeal in 1792. In 1796 Charles Alexander instituted a suit in the court of chancery, in Virginia, for the purpose of altering the boundaries by which the land of Parthenia had theretofore been held, and of laying off that tract so as to extend it to north seventeen west, thereby narrowing its breadth where it stretches towards the town of Alexander, and giving it more length. To this suit those under whom Pendleton claims, with others, were made defendants.

Charles Alexander departed this life in the year 1806, and the suit has not been revived.

Nathaniel Pendleton, being about to sell the land in controversy, tendered to Charles Alexander a deed for quieting the title; and, on his refusing to execute it, instituted a suit to compel him so to do. After the death of Charles Alexander this suit was brought against the defendant, his widow and children.

In the circuit court a decree was rendered in favor of the plaintiff, from which the defendants have appealed to this court.

This being an application to restrain a person from the assertion of title in the ordinary course of judicial proceedings, the prayer of the bill ought not to be granted in a doubtful case; but if the case be a clear one, the interposition

of equity is allowable; and the situation of the land adjoining a growing city, the number of persons who are consequently interested in the settlement of the question, and the numerous titles which depend on it, give it peculiar claims to the attention of the court.

By the laws which govern this case, a possession of thirty years under some circumstances, and of fifty years under any, constitutes a title against all the world. The appellee claiming under a possession perhaps from the year 1732, certainly from the year 1741, has a complete title, unless something can be alleged by the plaintiffs in error which shall deprive him of the advantages of that possession.

It is urged that the contract of 1741, between the Alexanders and the Dades, made the latter trustees for the former with respect to that portion of the land included in Berry's survey, which they had agreed to surrender in the event of establishing a more western back line. And that, therefore, in computing time, we must commence with the sale from Parthenia Dade to William Hartshorne, in May, 1778.

§ 888. *Notice of trust. Possession of successive owners united to produce title under statute of limitations.*

Had the land continued in possession of Parthenia Dade and her heirs, the question whether this contract was of limited duration, or contemplated some particular suit then intended to be brought, would merit consideration. But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration could not be affected by it unless he was a purchaser with notice. Finding Parthenia Dade in the quiet and undisturbed possession of four hundred acres of land, forming a parallelogram, limited on the west by the line north six west, he had a right to consider that line as established, so far as respected the land of Parthenia. He was not bound to know that a private parol agreement existed, which would control the possession. This trust, therefore, no more passed with the land to Hartshorne, than would any other secret trust of which he had no knowledge.

§ 889. *A suit not prosecuted to a decree or judgment is not constructive notice to a person not a pendente lite purchaser.*

The various suits which have been instituted by and against the ancestors of the appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a *pendente lite* purchaser; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice of the private agreement made in 1741.

§ 890. *Possession for fifty years, though with knowledge of a better title, if adversary, is a defense against that title.*

A knowledge of the suits, therefore, would not imply a knowledge of the trust; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defense against that title.

In 1796 Charles Alexander instituted a suit against sundry persons claiming the land in controversy for the purpose of altering the boundaries which had been held by Parthenia, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the court of chancery in the year 1741. In defending themselves against this claim, the purchasers of the land had a right to unite the possession of Parthenia Dade to their possession, without being affected by a secret trust, of which they had no notice. If, upon the trial of that suit, a possession of fifty years could not have been established, and if the court should have been of opinion that this

was not a case in which an adversary possession of thirty years would have constituted a bar, the merits of the title would have been necessarily investigated. But if Charles Alexander had permitted that suit to be dismissed, and had filed a new bill, he would not have been at liberty, in the computation of time, to avail himself of the pendency of the former suit, unless he could have connected the two suits together. The law is the same where a suit terminates by abatement, and is not revived; such a suit takes no time out of the act of limitations. The title of Pendleton, therefore, has from that act all the benefit which can be derived from a possession from the year 1741, when a possession ostensibly adversary by metes and bounds unquestionably commenced, to the institution of this suit in the year 1806. The deduction which the laws of Virginia make from all computations of time in consequence of the war of the Revolution will not be sufficient to take this case out of the act of limitations. The appellee's title, being secured by a possession of more than fifty years, is unquestionably good, and it is proper that the doubts which hang over it should be removed. There is no error in the proceedings of the circuit court, and the decree is affirmed.

§ 891. In general.—Under the fifteenth section of the statute of limitations of Texas, if the possession of two or more holding in privity will make out the term prescribed by the section, and both have had title or color of title, the bar will be effectual. *Christy v. Alford*,* 17 How., 601.

§ 892. Adverse possession under a survey may be connected with a continued possession under a patent subsequently issued on a survey. *Walden v. Gratz*,* 1 Wheat., 292.

§ 893. In order that a defendant in ejectment may claim title from the adverse possession of a predecessor in possession, he must show himself to hold in privity to that title. *Daswell v. De La Lanza*, 20 How., 29.

§ 894. The possession of successive disseizors cannot be tacked together so as to enable the last possessor to hold against the legal title of the owner unless they hold in privity under one another. The adverse possession, in order to become a bar, must continue the same in point of locality during the prescribed period of time. *Potts v. Gilbert*,* 3 Wash., 475.

§ 895. When a defendant may tack his possession to that of a prior occupant to make up a defense by lapse of time. *Barger v. Miller*, 4 Wash., 280.

§ 896. Under Virginia laws of 1835, land of A. in the adverse possession of B. was forfeited to the state, from which A. again acquired title. In ejectment by A. against B., the latter pleaded the statute of limitations. *Held*, the times of possession prior to and after forfeiture, being separately insufficient to establish the plea, the defense failed. *Armstrong v. Morrill*, 14 Wall., 120.

§ 897. The adverse possession of the defendant in ejectment, to constitute a bar to the plaintiff's right, must be continuous. Several successive but unconnected disseizins or adverse possessions, though amounting in the aggregate to twenty years, cannot be tacked together to make a continuous possession for that period in favor of the last occupant. *Shuffleton v. Nelson*, 2 Saw., 540.

§ 898. Where there are several adverse occupants, taking possession successively of the same piece of land, the last one may tack his possession to that of those preceding him, if there is a privity of possession between them, and thus establish a continuity of possession between the adverse claimants; and a parol bargain and sale, followed by a delivery of the possession, is sufficient to establish such privity of possession. *Ibid*.

§ 899. The rule that, to enable an occupant to tack the possession of a prior occupant to his, for the purpose of making out the statutory period of limitation, such occupants must have held under color of title and there must be a privity in deed between them, only applies to cases of constructive adverse possession, as where a party claiming possession of the whole actually occupies but a portion of the land called for by his deed. *Ibid*.

VIII. THE STATE.

SUMMARY—*Statute does not run against United States; grantees of public land*, §§ 900, 901.

§ 900. The United States is not bound by a state statute of limitations, whether named in it or not. The judiciary act of 1789 does not sanction the doctrine that the United States is

bound by the state statute. So held where, in 1875, the United States sued Thompson, a superintendent of Indian affairs, and his sureties on his official bond. The plea was the statute of limitations of Minnesota, which, by its terms, applied to the state. While Minnesota was a territory its statute of limitations applied to the United States. *United States v. Thompson*, §§ 902-3.

§ 901. State statutes of limitations do not run against the United States. The statute does not begin to run against grantees of the public lands until the patent therefor is issued by the United States. So held where certain lands were located in 1818, a survey made in 1862, and a patent issued in the same year, the plaintiff being the grantee of the patentee. The defendant relied on the statute of limitations. *Gibson v. Chouteau*, §§ 904-9.

[NOTES.— See §§ 910-936.]

UNITED STATES v. THOMPSON.

(8 Otto, 486-491. 1878.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—In 1875 the United States sued Thompson and his sureties on his official bond. The plea was the statute of limitations of Minnesota, which by its terms applied as well to the state. While Minnesota was a territory its statute of limitations applied to the United States. Plaintiff demurred to the plea and the demurrer was overruled.

Opinion by MR. JUSTICE SWAYNE.

This case turns upon a statute of the state of Minnesota which bars actions *ex contractu*, like this, within a specified time, and the same limitation is applied by the statute to the state. The United States are not named in it. The court below held that the statute applied to the United States, and rendered judgment against them.

§ 902. *The United States is not bound by a state statute of limitations, whether named in it or not.*

There is no opinion in the record, and we are at a loss to imagine the reasoning by which the result announced was reached. The federal courts have been in existence nearly a century. The reports of their decisions are numerous. They involve a great variety of questions, and the fruit of much learned research. We have been able to find but two cases in the lower federal courts in which it appears the question was raised. They are *United States v. Hoar*, 2 Mason, 311, and *United States v. Williams*, 5 McLean, 133. In both it was held, without the intimation of a doubt, that a state statute cannot bar the United States. The same doctrine has been several times laid down by this court; but it seems always to have been taken for granted, and in no instance to have been discussed either by counsel or the court. *United States v. Buford*, 3 Pet., 12; *Lindsey v. Miller*, 6 id., 666; *Gibson v. Chouteau*, 13 Wall., 92.

This state of things indicate a general conviction throughout the country that there is no foundation for a different proposition. There are also adjudications in the state reports upon the subject, but they concur with those to which we have referred. Among the earliest of them is *Stoughton v. Baker*, 4 Mass., 521. In that case Chief Justice Parsons said: "No laches can be imputed to the government, and against it no time runs so as to bar its rights." The examination of the subject by Judge Story, in *United States v. Hoar* (*supra*), is a fuller one than we have found anywhere else. He and Parsons are in accord. So far as we are advised, the case before us stands alone in American jurisprudence. It certainly has no precedent in the reported adjudications of the federal courts.

The United States possess other attributes of sovereignty resting also upon

the basis of universal consent and recognition. They cannot be sued without their consent. *United States v. Clark*, 8 Pet., 436. If they sue, and a balance is found in favor of the defendant, no judgment can be rendered against them, either for such balance or in any case for costs. *United States v. Boyd*, 5 How., 29 (BONDS, §§ 412-17); *Reeside v. Walker*, 11 id., 272. A judgment in their favor cannot be enjoined. *Hill v. United States*, 9 id., 386 (Eq., § 1365). Laches, however gross, cannot be imputed to them. *United States v. Kirkpatrick*, 9 Wheat., 720 (BONDS, §§ 419-22). There is no presumption of payment against them arising from lapse of time. *United States v. Williams*, *supra*. They can maintain a suit in their own name upon a non-negotiable claim assigned to them. *United States v. White*, 2 Hill (N. Y.), 59.

The rule of *nullum tempus occurrit regi* has existed as an element of the English law from a very early period. It is discussed in Bracton, and has come down to the present time. It is not necessary to advert to the qualifications which successive parliaments have applied to it.

The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included unless expressly named. No laches were imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants. "In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must, of necessity, be exercised by them if exercised at all, the reason for applying these principles is equally cogent."

When the colonies achieved their independence, each one took these prerogatives which had belonged to the crown, and when the national constitution was adopted they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments. *United States v. Hoar*, *supra*; *The People v. Gilbert*, 18 Johns., 227; Bac. Abr., tit. Limitation of Actions; id., tit. Prerog., E., 5, 6, 7; 5 Com. Dig., Parliament, R., 8; Chitty, Law of Prerogatives, 379.

Congress, like the British parliament, has made a number of specific limitations both in civil and criminal cases. They will be found in the Revised Statutes, and need not be here repeated.

§ 903. *The judiciary act of 1789 does not allow the United States to be bound by state statutes of limitation.*

The only argument suggested by the learned counsel for the defendants in error is that the judiciary act of 1789, re-enacted in the late revision of the statutes, declares "that the laws of the several states, except where the constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

It is insisted that the case in hand is within this statute. To this there are several answers. The United States, not being named in the statute of Minnesota, are not within its provisions. It does not and cannot "apply" to them. If it did it would be beyond the power of the state to pass it, a gross usurpation and void. It is not to be presumed that such was the intention of the state legislature in passing the act, as it certainly was not of congress in enacting the law of 1789. *United States v. Hoar*, *supra*; *Field v. United States*, 9 Pet., 182 (Gov., §§ 833-37).

The federal courts are instruments competently created by the nation for national purposes. The state can exercise no power over them or their proceedings, except so far as congress shall allow. This subject was considered in *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S., 29 (BANKS, NAT., §§ 205-10), and we need not pursue it further upon this occasion.

The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the states can pass statutes of limitation binding upon the federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark.

But viewing the subject in the light of considerations *ab inconvenienti*, we need not look beyond the consequences of the ruling, if sustained, of the court below. The doctrine is like applicable to civil and criminal actions. There are thirty-eight states in the Union. The limitations in like cases may be different in each state, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the states. How that mercy would in many cases be exercised it is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The judgment of the circuit court will be reversed, and the cause remanded with directions to proceed in conformity with this opinion; and it is so ordered.

GIBSON v. CHOUTEAU.

(13 Wallace, 92-104. 1871.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.—O'Connor had a Spanish grant for land, which he located early in this century, in the New Madrid country in Missouri. In 1811 the lands in that region were injured by an earthquake, and afterward congress granted to the holders of such land the privilege of surrendering them and taking instead certificates which they could locate on other public lands in Missouri. In 1818 O'Connor's certificate was located on behalf of Wilt, who had become its owner. The survey, however, was not returned to the recorder until 1841, when a patent certificate was issued upon it to O'Connor, or his legal representatives, but the survey was found to be imperfect, and after a reference to the surveyor-general of Missouri a new survey was made, and finally the patent was issued in 1862, to Mary McRee, who had obtained Wilt's rights to the property. In August, 1862, she conveyed to the plaintiff, Gibson. Defendants claimed under Wilt and Mrs. McRee, but their titles were declared invalid by the state courts, and not presenting any federal question, those decisions are not involved in this case. The defendants relied upon the statute of limitations, which the supreme court of Missouri held barred the title of the plaintiff.

§ 904. *Statutes of limitation do not run against the state or the United States.*

Opinion by MR. JUSTICE FIELD.

It is matter of common knowledge that statutes of limitation do not run against the state. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of

government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. *United States v. Hoar*, 2 Mason, 312; *People v. Gilbert*, 18 Johns., 228.

§ 905. *No state law can interfere with the power of congress over the public domain.*

With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere "with any regulation that congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

§ 906. *State statutes do not run against the grantees of the United States before the issuing of the patent.*

The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Yet such forfeiture is claimed by the defendants in this case, and is sanctioned by the decision of the supreme court of Missouri. That court does not, it is true, present its decision in this light, but on the contrary it attempts to reconcile its decision with positions substantially such as we have already stated respecting the power of congress over the public lands, and the inability of the state to interfere with the primary disposal of the soil of the United States. It declares it to be well settled that statutes of limitation of a state cannot run against the United States, nor affect their grantees, until the title has passed from the proprietary sovereignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent

is issued; and that the action upon the equitable title created by the location is only given by a statute of the state; and as the two rights of entry have a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force but for the operation of the fiction of relation. By a novel application of that doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

§ 907. *The doctrine of relation.*

By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. *Lessieur v. Price*, 12 How., 74.

§ 908. *In an action at law in the federal courts the patent is the superior and conclusive evidence of legal title.*

The supreme court of Missouri, considering that by this doctrine of relation the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before." *Gibson v. Chouteau*, 39 Mo., 588.

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land; and acquired the equitable claim or right to the title. *Lynch v. Bernal*, 9 Wall., 315; *Jackson v. Bard*, 4 Johns., 230; *Heath v. Ross*, 12 Johns., 140; *Littleton v. Cross*, 5 Barn. & Cress., 325, 328. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected.

In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of

equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. *Stephenson v. Smith*, 7 Mo., 610; *Barry v. Gamble*, 8 id., 881; *Cunningham v. Ashley*, 14 How., 377; *Lindsey v. Hawes*, 2 Black, 554; *Stark v. Starrs*, 6 Wall., 402; *Johnson v. Towsley*, 13 Wall., 72. But, in the action of ejectment in the federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.

So also in the action of ejectment in the state courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell v. Broderick*, 13 Pet., 450, "congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In several of the states, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title. *Estrada v. Murphy*, 19 Cal., 272; *Weber v. Marshall*, id., 457; *Lestrade v. Barth*, id., 671.

In *Maguire v. Vice*, 20 Mo., 431, where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defense, the supreme court of Missouri said: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party by his pleadings sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done whether he is seeking relief as plaintiff or defendant."

§ 909. *Mere occupation for the prescribed period constitutes no equity that can control the legal title subsequently conveyed to others by the patent of the United States.*

But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of congress in the

disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted. *Wilcox v. Jackson*, 13 Pet., 516, 517; *Irvine v. Marshall*, 20 How., 558; *Fenn v. Holme*, 21 id., 481; *Lindsey v. Miller*, 6 Pet., 672.

Judgment reversed, and the cause remanded for further proceedings pursuant to this opinion.

JUSTICES DAVIS and STRONG dissented.

§ 910. In general.—The statute of limitations does not run against a state. *Lindley v. Miller's Lessee*, 6 Pet., 666.

§ 911. Prescription does not avail against the United States. *Union M. & M. Co. v. Ferris*, 2 Saw., 179.

§ 912. There can be no presumption of payment against the government, nor can laches be imputed to it. *United States v. Williams*, 4 McL., 567.

§ 913. State statute of limitation cannot bar the United States to a right of action under act of congress. *McGlinchy v. United States*, 4 Cliff., 312.

§ 914. The United States takes no better title by assignment than the assignor had; and if the claim was barred by limitation in his hands it is barred in theirs. *United States v. Buford*, 3 Pet., 12.

§ 915. The government is entitled to the benefit of the rule of laches against a claimant of a grant. *United States v. Moore*, 12 How., 223.

§ 916. Laches is not attributable to the United States, and delay in collecting a debt to the government does not release the sureties of the debtor. *Smith v. United States*, 5 Pet., 292.

§ 917. Laches cannot be imputed to the government. *United States v. Vanzandt*, 11 Wheat., 184; *United States v. Kirkpatrick*, 9 Wheat., 720; *United States v. Little Miami, etc., R. Co.*, 1 Fed. R., 701; *United States v. Barrowcliff*, 3 Ben., 519.

§ 918. The claims of the United States are liable to be defeated on the score of laches and of their being stale. *United States v. Flint*, 4 Saw., 42.

§ 919. Section 4 of the act of 1839, limiting suits for penalties and forfeitures to five years, does not apply to suits on official bonds. *Raymond v. United States*,* 14 Blatch., 51.

§ 920. The statute of limitations does not run against the government, nor is it chargeable with laches; and on the same principle, the lapse of time affords no presumption of payment against it. *United States v. Williams*, 5 McL., 133.

§ 921. The statute of limitations does not bar a claim of the government unless the provision be express that it shall be a bar. *United States v. Davis*, 3 McL., 483.

§ 922. No right of action accruing to the United States is barred by lapse of time unless where there may be special provision by act of congress to that effect. *Limitation of Suits by the United States*,* 7 Op. Att'y Gen'l, 614.

§ 923. It is a decisive answer to a claim in favor of the government to say that it is based on transactions which are twenty-three years old; for although the statute of limitations cannot be pleaded against the government, the government, like anybody else, is bound by the rules of evidence and by the natural presumptions arising from the facts of the case. It is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, and such lapse of time proves that fact as fully as if it had been attested by credible witnesses. *Claim of Reside*,* 9 Op. Att'y Gen'l, 197.

§ 924. The statutes of limitation do not run against the United States. Hence, so long as land through which water flows is owned by the United States, no use or appropriation of the water flowing through such land can avail as a foundation of title by prescription, or defeat or modify the title conveyed to the grantee of the government. To gain a right to the use of the water by prescription the adverse use and appropriation must continue for the full statute period after the title to the land, against which the right is sought to be asserted, has passed from the United States. *Union M. & M. Co. v. Ferris*, 2 Saw., 176.

§ 925. Where a person remained a creditor on the books of the register of the treasury from 1781 until 1850, when his representatives demanded payment of the claim, *held*, that the claim was barred by the act of congress of July 9, 1798. (1 Story's Laws, 525.) *Claim of Ross' Representatives*,* 5 Op. Att'y Gen'l, 250.

§ 926. Moreover the legal presumptions arising from the lapse of so great a period of time would render it improper for the secretary of the treasury to pay claims of this character without special authority from congress. *Ibid.*

§ 927. The fact that a claim presented to a department of the government for payment is one of old standing is not an absolute bar to its payment. The great lapse of time furnishes strong presumptive evidence against its justice, but this presumption may be rebutted by other evidence accounting for the delay. *Accounts and Accounting Officers*,* 2 Op. Att'y Gen'l, 463.

§ 928. State statutes of limitations do not run against the United States. An action was brought upon a judgment obtained against J. C. Ramsey and others, in 1857, by the United States, the administrator of Ramsey alone being sued. It was held that the statute of limitations of Minnesota did not run against the United States, whether the claims rest in judgment or not. *United States v. Spiel*,* 8 McC., 107.

§ 929. Time does not run against the United States, and public policy forbids that the negligence of the officers of the government should be held to create laches on the part of the government, except, probably, as to third persons who are strangers to the transaction as to which the negligence may occur. So held where an act of congress authorized the secretary of the treasury to pay out sums up to a certain amount to aid the city of Alexandria in constructing a canal, when the city should deposit the stocks held by it in the canal company as collateral. The sums were paid out, but the city deposited only one thousand five hundred shares, although it owned three thousand five hundred, two thousand of which she could not transfer, because they were not paid for. The city afterwards paid for the two thousand shares and subscribed for one thousand five hundred additional, but sold two thousand seven hundred and fifty, leaving seven hundred and fifty shares at its disposal, when, in 1883, the United States commenced an action against the city to compel it to deposit the two thousand shares. No demand had ever been made for them. A decree in favor of the government was given. *United States v. City of Alexandria*, 4 Hughes, 545 (§§ 327-29).

§ 930. Prescription.—The rules of prescription which apply between individuals do not affect the various states. So held where the state of Rhode Island brought an action against the state of Massachusetts to set aside, on the ground of mistake, an agreement fixing the boundaries between the two states, entered into in 1740, but never ratified, although acted upon. *State of Rhode Island v. State of Massachusetts*, 15 Pet., 238 (§§ 439-41).

§ 931. Presumption of a grant.—It seems that the fact that the state or its agents allowed first one and then another to occupy and use lands as private property for a long time will raise a presumption that the state has granted the lands to some one. It is not necessary to fix upon any one as the grantee, so that the title is out of the state. A possession of thirty years under known and visible lines and boundaries, using the land as private property, will show a title out of the state. *McIntyre v. Thompson*,* 4 Hughes, 562.

§ 932. A grant from the crown may be presumed after an uninterrupted possession of sixty years, or a prescriptive possession of crown lands for forty years. *Mitchell v. United States*, 9 Pet., 711.

§ 932a. Twenty years' possession is not presumptive evidence of a grant. *Pierson v. Elgar*, 4 Cr. C. C., 454.

§ 933. Decedents' estates.—A state statute regulating the mode of proving and collecting claims against the estates of decedents does not affect the United States. *United States v. Backus*,* 6 McL., 448.

§ 934. State statutes of limitations cannot, of their own force, bind or bar the suits of the national government in the national courts, unless expressly so provided by act of congress. The general statute of limitations and the statute limiting actions against executors and administrators in Massachusetts cannot be pleaded in bar to an action by the United States in the federal courts. *United States v. Hoar*,* 2 Mason, 311.

§ 935. Marshals' bonds.—The statute of limitations of six years, contained in section 786 of the Revised Statutes, with reference to actions on marshals' bonds, does not apply to suits brought by the United States. *United States v. Godbold*,* 3 Woods, 550; *Same v. Rand*,* 4 Saw., 272.

§ 936. State nominal plaintiff merely.—The principle that the statute of limitations does not run against the state does not apply where the real plaintiff is a corporation in which the state is a stockholder. So held in an action brought by the Bank of the United States, in which the United States government was a large stockholder, to which the act of limitations was pleaded. *Bank of United States v. McKenzie*,* 2 Marsh., 393.

IX. REMOVAL OF THE STATUTORY BAR.

1. *Acknowledgment and New Promise.*

SUMMARY — Conditional, §§ 937, 938; by one partner after dissolution, § 937. — Assertion of ability to pay, § 939.

§ 937. An acknowledgment to revive an original cause of action must be unqualified and unconditional, and must show a present subsisting indebtedness. Performance of the condition must be shown if the acknowledgment is conditional. After the dissolution of a firm a partner cannot, by his acknowledgment, revive a firm debt barred by the statute of limitations. So held in an action upon a partnership debt, contracted before 1813. The partnership was dissolved in 1813, and the action was commenced in 1820. Evidence was offered to prove acknowledgments of the debt made by one of the partners at various times between 1813 and 1820. *Bell v. Morrison*, §§ 940-47.

§ 938. If the acknowledgment be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit* for which the old debt is a sufficient consideration, or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown. So held in an action of *assumpsit* on a promise in writing to deliver a quantity of powder. The defendant had stated to one witness that if the plaintiff had come forward and settled certain claims the defendant had against him, he would have given him his powder; and to another, he should be ready to deliver the powder whenever the plaintiff settled a suit which E. had brought against defendant on account of a patent-right and machine sold to him by plaintiff. *Wetzell v. Bussard*, §§ 948-49.

§ 939. An action was commenced in July, 1825, by the Bank of Columbia on a promissory note payable in 1816. It was given in evidence that in 1823, Moore, the maker, while under the influence of liquor, exclaimed to some companions in the presence of one of the bank's clerks that he was free of debt, "except one demand of \$500 in the Bank of Columbia, which I can pay at any time;" also that no other note for \$500, except the one sued on, stood charged to him at the time of the conversation. This was held not to be an acknowledgment sufficient to remove the bar of the statute. *Moore v. Bank of Columbia*, §§ 950-51.

[NOTES. — See §§ 952-995.]

BELL v. MORRISON.

(1 Peters, 351-375. 1828.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS. — This cause comes before us upon a writ of error to the circuit court of the district of Kentucky. The original action was brought by the plaintiffs in error against the defendants, on the 16th of August, 1820, to recover the value of certain iron castings, sold and delivered to them by the plaintiff. The defendants pleaded *non assumpsit*, and *non assumpsit* within five years (the latter being the time prescribed by the Kentucky statute of limitations in cases of this nature), upon which pleas the parties were at issue; and at the trial a verdict was returned by the jury for the defendants, upon which judgment passed in their favor. A bill of exceptions was taken to certain points, ruled by the circuit court at the trial, and the validity of these exceptions has constituted the ground of the argument for the reversal which has been insisted on in this court.

§ 940. *What will entitle a deposition to be read in evidence.*

The first objection urged is the exclusion of the deposition of a Mr. Mockbee, which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion is that there was no proof, by the certificate of the magistrate or otherwise, that the deposition was reduced to writing in the presence of the magistrate. This is a point altogether dependent upon the con-

struction of the act of congress of the 4th of September, 1789, under the authority of which the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible. The act of congress provides "that every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

§ 941. — *magistrate's certificate is evidence of facts therein stated.*

Without doubt the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed. It is not denied that the reducing of the deposition to writing in the presence of the magistrate is a fact made material by the statute, and that proof of it is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate to justify the presumption that it was done. The certificate is in these words: "State of Tennessee, Dickson county, ss. At Charlotte, in said county, on the 4th day of July, 1822, before me, James M. Ross, justice of the peace, and one of the judges of the county court of Dickson county, came, personally, John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned, and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing, by him in his own proper hand." The certificate then proceeds to state the reason for taking the deposition, etc., in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate, and it is scarcely presumable that this was accidentally omitted. At all events every word in the certificate may be perfectly true, and yet the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it.

§ 942. — *certificate should show a compliance with the requirements of the statute.*

And we think in a case of this nature, where evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with. We are therefore of opinion that the deposition was properly rejected.

The more important question in the cause is that relative to the evidence introduced to repel the plea of the statute of limitations. In the course of the trial the plaintiff read to the jury certain articles of copartnership, made between the defendants, in March, 1810, whereby the defendants entered into

a joint trade and partnership in the manufacturing of salt, at a place known by the name of the United States Saline, near the Wabash river, within the Illinois Territory, for the term of three years then next ensuing, under the style of Taylor, Wilkins & Co. He also gave evidence that large quantities of iron castings had been sold and delivered by him to the company during the term of the copartnership. He then introduced the testimony of one Patterson Baine, who stated "that some time in the year 1818 or 1819, the plaintiff, Bell, came to his house, in Lexington, and stated that he had again come up to endeavor to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's (one of the defendants) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation on the subject of the plaintiff's account against the Saline Company, for metal furnished, which is not recollected by the witness. The witness recollects that Morrison stated that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor (one of the defendants), which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him good-by, and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison, and returned with the witness to his house, where he remained until after breakfast on the next day; that shortly after breakfast Morrison came to the house of the witness, and said to Bell (the plaintiff) that he was very anxious that his (the plaintiff's) account should be settled; adding, "I know we are owing you, and I am anxious it should be settled." He then mentioned to the plaintiff that he (Morrison) was getting old, and did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff \$7,000, and close the business. The plaintiff refused to take it, and they parted; that no account or papers of any kind were shown or produced by Bell at the time of these conversations with Morrison; but he understood the conversations to relate to the claim for castings furnished by him to the company of Taylor, Wilkins, and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that "a half loaf is better than no bread." The plaintiff also introduced certain letters written by Morrison and Butler (two of the defendants) to him. The first was a letter from Morrison, dated 2d of October, 1814, and it contains, among others, the following expressions: "I wish whatever is due to you should be paid; I have once more to ask you to follow the advice I am about to offer, viz.: to come up here, without delay (as Col. Butler may be soon ordered off), and I cannot believe your present suit will answer any purpose," etc., etc. "It is not our wish to keep from you whatever may be your just due. We have sent for the company books, some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatley's being there, I have no doubt but your account can be adjusted, and that more to your satisfaction than it ever can be from the result of your suit," etc. "I wish your account settled, and I have no hesitation in saying, on your coming here, it will be done." The next was a letter from Butler, dated 26th of October, 1817, in which he informs the plaintiff that, on the 20th of November, Messrs. Morrison and Wilkins will be at Hopkinsville "for the purpose of adjusting some of the affairs of the old Saline Company," etc., and desires that he "will be present, in order that a settlement may be effected, if possible, of the

account which you (he) set up against the company." The next is from Butler, dated the 8th of November, 1817, again mentioning the intended meeting on the 20th of November, "for the purpose of adjusting our old account with you;" and he adds: "I hope, therefore, you will be at Hopkinsville, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious." The next is from Butler, dated the 23d of October, 1818, in which he alludes to a complaint made by the plaintiff, of Butler's absence from home on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs, "about a day of meeting to adjust the account between the former Saline Company and yourself," and excuses himself for his absence. He adds: "I have now, sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, etc. If it would suit you to be at Frankfort, during the sitting of the legislature, we might possibly come to some understanding on the subject." The next is a letter from Jonathan Taylor (one of the defendants) to the plaintiff, dated the 13th of March, 1818, in which he says: "I received a letter last Monday from Col. Butler inviting me to attend an appointment with you at Hopkinsville, on the 26th of this month, for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we make an arrangement, equally mutual, for the metal I may hereafter want, it can be done." Other letters of Taylor were read in evidence, but they all bear date in the years 1811 and 1812.

It was further proved that the plaintiff was present in 1814 when the Saline and improvements were delivered over to Bates, the succeeding lessee; and that the plaintiff was then apprised that the term of the defendants as lessees had terminated. After the evidence on the part of the plaintiff was closed, the defendants' counsel moved the court to exclude the testimony of Patterson Baine, and all the letters bearing date within five years before the bringing of this suit, offered by the plaintiff to show a promise on the part of the defendants, or any one of them, or any member of said firm or partnership, within five years next before the commencement of this suit; and the court so excluded from the jury the evidence of the said Baine, and all the letters dated within five years aforesaid, tending to prove a promise in five years next before the commencement of this suit by the defendants, or either of them, or any member of said firm or partnership, as prayed by the defendants' counsel; and decided that "there was no sufficient evidence or admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise in five years before the commencement of this suit as would take the case out of the statute of limitations, or should be left to a jury as conducing to that effect." To which opinion of the court the plaintiff filed his bill of exceptions; and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is, whether the evidence so excluded (supposing it to be in all other respects unobjectionable) was competent in point of law to have been left to the jury to infer a promise sufficient to take the case out of the statute of limitations. The second is, whether, supposing it would be competent in ordinary cases, the fact that it was the acknowledgment or promise of one partner, after the dissolution of the partnership, did not justify its exclusion as incompetent evidence to bind the other partners.

§ 943. *Federal courts follow the decisions of state tribunals in construing state statutes. Force of English decisions.*

The statute of limitations of Kentucky is substantially the same with the statute of 21 of James, chapter 16, with the exception that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to upon the present occasion as illustrative of the true construction of the statute, and in this view are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority upon the construction of the statute passed by a state upon the like subject; for this justly belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence than those of any foreign tribunal, however respectable. If, therefore, upon examination, it shall be found that the doctrines of the Kentucky courts upon this subject are irreconcilable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law and administer the same justice which the state court would administer between the same parties.

§ 944. *Rules for construing statutes of limitation.*

It has often been matter of regret in modern times that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation, by reason of the death or removal of witnesses. It has manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations and to let in evidence *aliunde* to establish any debt, however large, and at whatever distance of time,—it is easy to perceive that the wholesome objects of the statute must be in a great measure defective, and the statute virtually repealed.

The English decisions upon this subject have gone great lengths; greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and in some instances to an extent which is irreconcilable with any just principle. There appears at present a disposition on the part of the English courts to retrace their steps, and, as far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like

disposition. In the recent case of *Bangs v. Hall*, 2 Pick., 368, the principal cases were reviewed by the supreme court of Massachusetts; and it was held that, to take a case out of the statute, there must be an unqualified acknowledgment not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed. A doctrine quite as comprehensive has been asserted in the supreme court of New York. The subject was much considered in the case of *Sands v. Gelston*, 15 Johns., 511, where Mr. Chief Justice Spencer, in delivering the opinion of the court, said: "That if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute." In consonance with this principle the same court has held that "if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defense, such an acknowledgment is wholly insufficient." See, also, *Brown v. Campbell*, 1 Serg. & Rawle, 176; *Fries v. Boiselet*, 9 Serg. & Rawle, 128. In the case of *Clementson v. Williams*, 8 Cr., 72, this court expressed the opinion that the decisions on this subject had gone full as far as they ought to be carried, and that the court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case an attempt was made to charge a partnership, by an acknowledgment made after its dissolution by one of the partners, when an account was presented to him, that "the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself and did not know of its being ever paid." It was held that this was not a sufficient acknowledgment to take the case out of the statute. The chief justice, in delivering the opinion of the court, said: "In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account. But this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient to take the case out of the act that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due."

In the case of *Wetzell v. Bussard*, 11 Wheat., 309 (§§ 948-49, *infra*), the subject again came before this court; and the English and American authorities were deliberately examined. The court there expressly held that "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown."

§ 945. *An acknowledgment to revive an original cause of action must be unqualified and unconditional, and must show a present subsisting indebtedness. Performance of the condition must be shown if the acknowledgment is conditional.*

We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is

sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed.

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries.

It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light in which it was viewed by English judges at an early period, as a beneficial law, on which the security of all men depends, we think its provisions ought not to be lightly overturned; and that no creditor has a right to complain of a strict construction, since it is only by his own fault and laches that it can be brought to bear injuriously upon him. And if the early interpretation had been adhered to, that nothing but an express promise should take a case out of the statute, it is far from being certain that it would not have generally been in promotion of justice.

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky courts, upon the construction of their own statute of limitations, which, if they differed from those of other courts, would, as matter of local law, govern this court upon the present occasion. In the construction of local statutes, we have been in the habit of respecting and following the judgments of the local tribunals.

The first and leading case is *Bell v. Rowland's Administrators*, in *Hardin's Rep.*, 301. In that case the defendant made an acknowledgment "that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia (the place where the original transaction took place, in the year 1785); and, if his brother had not paid it, he owed it yet." The court held that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise only where the party ought to promise; and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the court, which is drawn up with great clearness and force, goes much further. The court said that the English decisions were not obligatory upon them, in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements, for the purpose of evading the statute, they must be disregarded. If the slightest acknowledgment; if strained, constructive acknowledgments and promises, are held sufficient, it must multiply litigation, produce endless uncertainty, and, it is to be feared, a fruitful crop of perjuries.

Slight circumstances and a man's loose expressions would be construed into a full acknowledgment of the debt, when he himself neither intended to make nor understood himself as making any acknowledgment at all. Instances of this sort are frequent in the books, but the example is too dangerous to be countenanced. And the court further declared: "Upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable certainty, is that, in order to take the case out of the statute of limitations, an express acknowledgment of the debt as a debt due at the time, coupled with the original consideration, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute."

There was another point in the case deserving of notice, which was, whether the court ought to have instructed the jury as to the law of the case, and then have left it with them to determine whether an acknowledgment of the debt, and a promise to pay it, had been proved to have been made within the five years; upon which it was held that it was competent for the court either to do so, or (as it did in that case), taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, to instruct the jury as to the law arising upon those facts.

This case has never been departed from in Kentucky, and has been frequently recognized. In *Harrison v. Handley*, 1 Bibb, 443, the plaintiff, to take the case out of the statute, produced a witness who swore "that some time in May or June, 1796, he presented an account to W. H. (the defendant) amounting to £250 or £260; that H. objected to certain articles in the said account, and after the said articles were stricken out of the account H. then acknowledged it was all right. The court below ruled that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the court of appeals. Mr. Chief Justice Bibb, in delivering the opinion of the court, adverted to the case of *Bell v. Rowland's Administrators*, and recognized its authority in the fullest terms. And after expressing a doubt whether an implied promise would not be barred by the statute, he proceeded to say: "Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise contrary to the provisions of the statute must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time; not whether the debt was once an existing debt. That the law will argumentatively make it a debt *in præsentia*, if the party does not in his acknowledgment say it is not, or prove payment, is a proposition that cannot be granted, in opposition to the provisions of the statute. Where the limitation has run to get clear of it, the whole burden of proof is thrown on the plaintiff to prove a good and subsisting debt, and a promise to pay within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay; there was no express acknowledgment of a then subsisting debt; there was no assent to pay. "H. then acknowledged the amount was all right," is too loose, vague and indefinite an acknowledgment to revive a transaction, and put it under investigation again after the law had closed it. That the amount was right could be true, and might well be acknowledged, if the articles had been truly noted, notwithstanding the party might have paid it or was unwilling to acknowledge it as a debt then subsisting; and that is the point to which an express acknowledgment should have been proved." This is certainly a very strong case to illustrate the rule adopted in Kentucky.

In *Gray v. Lawridge*, 2 Bibb, 284, it was proved on the trial that the party had admitted the justice of the account within five years, and that it might go in discharge of the interest due on a bond of the defendant, on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, nor the amount thus acknowledged by the plaintiff. The court held that the acknowledgment did not go further than that the demand should be allowed in payment of the interest; and that so much as the party could show of a debt due to him, not exceeding the amount of the interest then due, was taken out of the statute, and no further. In *Ormsby v. Letcher*, 3 Bibb, 269, it was decided that an agreement of the defendant within five years, that a settlement made with the brother of the defendant should be subject to the examination of either party, did not take the case out of the statute. It may be inferred that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff; although the report does not so state. The court said: "This agreement does not contain an acknowledgment of a subsisting demand, and a promise to pay in consideration thereof." The language of this case, as well as that in *Harrison v. Handley*, might lead to the impression that the court thought that an acknowledgment of a subsisting debt was not alone sufficient; but that there must be also a promise to pay the debt. But perhaps it is more correct to construe it as importing no more than that there must be such an acknowledgment, coupled with circumstances from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions which we have met with in the Kentucky reports on this point. They evince a strong disposition in the courts of that state to restrict, within very close limits, every attempt to revive debts by implied promises resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence, in the case at bar, resolves itself into two heads: first, whether the admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties understood the balance to be, is sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be; secondly, if not, whether the admission on the part of Morrison, of his willingness to pay \$7,000, and close the business, might, under all the circumstances, entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the circuit court.

In both of these views the case is not without its difficulties; and the Kentucky decisions present no authority directly in point. The evidence is clear of the admission of an unsettled account, as well from the letters of Butler as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff; but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover anything. The language might be equally true whether the debt were \$1 or \$10,000. It is indispensable for the plaintiff to go further, and to establish, by independent evidence, the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground

of the new implied promise; but it requires other intrinsic aid before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due, or some balance owing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is, whether the law will imply such a promise from language so doubtful and general. The language of the court, in *Harrison v. Hanley*, was that "mere loose expressions or vague acknowledgments will not suffice." We think that such a general admission of an unsettled account, and of an indeterminate debt, would by the courts of Kentucky be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassment. Was Morrison's offer of \$7,000, to close the business, the absolute admission of a debt to that amount, or a conditional promise to pay that sum, if the party would accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself that Morrison did not know the state of the partnership accounts, and had not the partnership books to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old, and was anxious for a settlement. His offer must therefore be deemed to be in the nature of a compromise, to pay the sum if the plaintiff would give a complete discharge of his claims; or, to use his own words, "and close the business." It may therefore be fairly deemed a conditional offer to pay a conjectural, not a known balance, to buy peace, and not to acknowledge an absolute debt. If this be as we think it is, a conditional offer, then upon the clear text of the Kentucky, as well as the English and of other American decisions, the case would not be taken out of the statute unless the plaintiff had performed the condition.

§ 946. *After the dissolution of a firm a partner cannot by his acknowledgment revive a firm debt barred by the statute of limitations.*

But if this view of the case should be more doubtful than it seems to us to be, it still remains to consider whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt need not be inquired into; to maintain the present action it must be binding upon all.

§ 947. — *review of authorities.*

In the case of *Bland v. Haselrig*, 2 Vent., 151, where the action was against four upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years and that the others did not, three judges against Ventris, J., held that the plaintiff could not have judgment against the defendant who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings and establish a joint promise. It is very doubtful, upon

a critical examination of the report, whether the opinion of the court or of any of the judges proceeded solely upon such a ground.

In *Whitcomb v. Whiting*, 2 Doug., 652, decided in 1781, in an action on a joint and several note brought against one of the makers, it was held that proof of payment by one of the others of interest on the note and of part of the principal, within six years, took the case out of the statute as against the defendant who was sued. Lord Mansfield said: "Payment by one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." This is the whole reasoning reported in the case and is certainly not very satisfactory. It assumes that one party who has authority to discharge has necessarily, also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole, and that a virtual agency exists by analogy to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does inure for the benefit of the whole, but this arises not so much from any virtual agency for the whole as by operation of law, for the payment extinguishes the debt. If such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt and the creditor could no longer sue them. In truth, he who pays a joint debt pays to discharge himself, and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them in contribution without such payment has been rightfully made, and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt, and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great difference between creating a virtual agency which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable, and yet refuse to authorize a charge where there at present exists no legal liability to pay. Yet if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made.

The doctrine of *Whitcomb v. Whiting* has been followed in England in subsequent cases, and was applied in a strong manner in *Jackson v. Fairbank*, 2 H. Bl., 340, where the admission of a creditor to prove a debt on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor in a several action against him, in which he pleaded the statute as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In *Clarke v. Bradshaw*, 3 Esp., 155, Lord Kenyon, at *nisi prius*, expressed some doubts upon it, and the cause went off on another ground. And in *Brandram v. Wharton*, 1 Barn. & Ald., 463, the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion, used language from which his dissatisfaction with the whole doctrine may be clearly inferred. "This doctrine," said he, "of rebutting the statute of limitations by an acknowledgment other than that of the party himself, begun with the case of *Whitcomb v. Whiting*. By that decision, where, however, there was an express acknowledgment by an actual

payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship, for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute by means of an implied acknowledgment."

The English cases decided since the American Revolution are, by an express statute of Kentucky, declared not to be of authority in their courts, and, consequently, *Whitcomb v. Whiting*, in *Douglas*, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

In the American courts, so far as our researches have extended, few cases have been litigated upon this question. In *Smith's Adm'r v. D. and G. Ludlow*, 6 Johns., 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given that the other partner was authorized to adjust all accounts, and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved that the plaintiff called on the partner who pleaded the statute before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute, and said that, without any express authority, the confession of one partner after the dissolution will take a debt out of the statute. The acknowledgment will not of itself be evidence of an original debt; for that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident from the cases of *Whitcomb v. Whiting*, and *Jackson v. Fairbank*; and it results necessarily from the power given to adjust accounts. The court also thought the acknowledgment of the partner setting up the statute was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him to settle the account. The correctness of the decision cannot, upon the general view taken by the court, be questioned. In *Roosevelt v. Marks*, 6 Johns., 266, 291, Mr. Chancellor Kent admitted the authority of *Whitcomb v. Whiting*, but denied that of *Jackson v. Fairbank*, for reasons which appear to us solid and satisfactory. Upon some other cases in New York we shall have occasion hereafter to comment. In *Hunt v. Bridgham*, 2 Pick., 581, the supreme court of Massachusetts, upon the authority of the cases in *Douglas*, *H. Blackstone* and *Johnson*, held that a partial payment by the principal debtor on a note took the case out of the statute of limitations,

as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. *Shelton v. Cocke*, 3 Mumford, 191, is to the same effect, and contains a mere annunciation of the rule, without any discussion of its principle. *Simpson v. Geddes*, 2 Bay, 533, proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt., 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other states, as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations to assist our reasoning, and decide the case now as if it had never been decided before.

By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts, and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified and restrained by the express delegation of the whole authority to one of the partners.

The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt,—we mean, admitted by the whole partnership, or unbarred by the statute,—but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract binding upon the others, his acknowledgment is inoperative and void as to them.

There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands, not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit* on which an action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off as a support for the old. What, indeed, would seem to be decisive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay upon condition that the other do an act,

performance must be shown before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the debt? The plain reason is, that the promise is a new one, by or to the administrator himself, upon the original consideration, and not a revival of the original promise. So, if a man promises to pay a pre-existing debt, barred by the statute, when he is able, or at a future day, his ability must be shown, or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment, but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute or as a conditional promise, which may depend upon the rules of pleading.

This very point came before the twelve judges in the case of *Hyleing v. Hastings*, 1 Ld. Raym., 389, 421, in the time of Lord Holt. There one of the points was, "Whether the acknowledgment of a debt within six years would amount to a new promise, to bring it out of the statute; and they were all of opinion that it would not, but that it was evidence of a promise." Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise; and that it is the new promise which takes the case out of the statute. Now, what is a new promise but a new contract? a contract to pay, upon a pre-existing consideration, which does not, of itself, bind the party to pay, independently of the contract? So in *Boydell v. Drummond*, 2 Campb., 157, Lord Ellenborough, with his characteristic precision, said: "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived." And it may be affirmed that the general current of the English as well as the American authorities conforms to this view of the operation of an acknowledgment. In *Jones v. Moore*, 5 Binney, 473, Mr. Chief Justice Tilghman went into an elaborate examination of this very point, and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise; and, he added, "I cannot comprehend the meaning of reviving the old debt in any other manner than by a new promise."

There is a class of cases not yet adverted to, which materially illustrates the right and powers of partners after the dissolution of the partnership, and bears directly on the point under consideration. In *Hackley v. Patrick*, 3 Johns., 536, it was said by the court that "after a dissolution of the partnership, the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners any more than his giving a promissory note in the name of the firm, or any other act." And it was therefore held that the plaintiff must produce further evidence of the existence of an antecedent debt before he could recover, even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court, in *Walden v. Sherburne*, 15 Johns., 409, 424; although it was admitted that in *Wood v. Braddick*, 1 Taunt., 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against

the partnership, why should it be evidence against it at all? If evidence *aliunde* of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties, namely, the introduction of stale and dormant demands, of long standing and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the debt as a debt, but are bound by the acknowledgment of the debt as a promise upon extrinsic proof. The doctrine in 1 Taunt., 104, stands upon a clear if it be a legal ground; that, as to the things past, the partnership continues and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is, that after a dissolution of a partnership no partner can create a cause of action against the other partners, except by a new authority, communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them they are not bound by it. When the statute of limitations has once run against a debt the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist, after a dissolution of the partnership, in any partner.

There is a case in the Kentucky reports, not cited at the bar, which coincides, as far as it goes, with our own views; and, if taken as a general exposition of the law according to its terms, is conclusive on this point. It is the case of *Walker and Evans v. Duberry*, 1 Marsh., 189. It is very briefly reported, and the opinion of the court was as follows: "We are of opinion that the court below improperly admitted as evidence against Walker the certificate of J. T. Evans, made after the dissolution of the partnership between Walker and Evans, acknowledging that the partnership firm was indebted to the defendant, Duberry, in the sum demanded in the action brought by him in the court below." It cites 3 Johns., 536; 3 Munf., 191.

It does not appear what was the state of facts in the court below, nor whether this was an action in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted that the acknowledgment of a debt by one partner after a dissolution is not evidence against the other. Whether the court meant to say in no case whatever, or only when the debt itself was proved *aliunde*, does not appear. Its language is general and would seem to include all cases; and, if any qualification were intended, it would have been natural for the court to express that qualification, and have confined it to the circumstances of the case. The only room

for doubt arises from the citations of 3 Johnson and 3 Munford. The former has been already adverted to; and the latter, *Shelton v. Cocke et al.*, 3 Munf., 191, recognized the distinction asserted in 3 Johns. as sound. These citations may, however, have been referred to as mere illustrations going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view it leads to the most serious doubts whether the state courts of Kentucky would ever adopt the doctrine of *Whitcomb v. Whiting*, in Douglas; especially so as the early case in 2 Vent., 151, carries an almost irresistible presumption that the courts, at that time, held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole it is our judgment that there is no error in the decision of the circuit court, and it ought to be affirmed.

It is, however, to be understood that this opinion thus expressed is not unanimous, but of the majority of the court; and as is apparent from the preceding reasoning, it has been principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

Judgment affirmed, with costs.

WETZELL v. BUSSARD.

(11 Wheaton, 309-316. 1826.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was an action of *assumpsit* brought by the plaintiff in the circuit court of the United States for the District of Columbia and county of Washington, on a promise in writing to deliver a quantity of powder. The defendant pleaded the general issue and the statute of limitations. The original *assumpsit* having been satisfactorily proved, the plaintiff, to support the second issue, introduced a witness who swore that the defendant, in a conversation with him soon after the commencement of the suit, said that the plaintiff need not have sued him, for, if he had come forward and settled certain claims which the defendant had against him, the defendant would have given him his powder. To another witness who spoke to him before the commencement of the suit, at the instance of the plaintiff, he said that he should be ready to deliver the powder whenever the plaintiff settled a suit which Dr. Ewell had brought against him in the district court at Alexandria. Other witnesses proved declarations of the same import:

The defendant demurred to this testimony, and the plaintiff joined in demurrer. The court gave judgment in favor of the defendant, and the plaintiff has brought his cause by a writ of error into this court.

§ 948. *An acknowledgment, to revive an original cause of action barred by the statute of limitations, must be unqualified and unconditional.*

It is contended, on the part of the plaintiff, that he has proved an acknowledgment of the debt, and that such acknowledgment, according to a long series of decisions, revives the original promise, or lays a foundation on which the law raises a new promise. The English as well as American books are filled with decisions which support this general proposition. An unqualified admission, that the debt is due at the time, has always been held to remove the bar created by the statute. But where the terms of the acknowledgment are in any degree equivocal, or where some qualification has been annexed to the admission, the question whether the declarations of the party amount to

an acknowledgment of an existing debt, on which the law will raise an *assumpsit*, has been differently determined.

Leaper v. Tatton, 16 East, 420, was a suit against the acceptor of a bill of exchange, who pleaded the statute of limitations. At the trial the plaintiff offered a witness who swore that the defendant, when applied to for payment, said that he had been liable, but was not liable then because the bill was out of date. He acknowledged his acceptance, but said he would not pay it; that it was not in his power to pay it. A verdict was taken for the plaintiff; and on a motion for a new trial, Lord Ellenborough said: "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and, as the limitation of the statute is only a presumptive payment if his own acknowledgment that he has not paid be shown, it does away the statute." Bayley, J., said the acknowledgment was evidence of a debt; acknowledging his acceptance, and that he has not paid it, creates a debt. The rule was discharged.

Although in this case the defendant did not expressly admit the existence of the debt, the implication is irresistible. The reason he assigns for not being liable is, that the bill is out of date; and his reason for not paying it is his inability. The court so understood the testimony; and Lord Ellenborough speaks of his acknowledgment as amounting to an admission that he had not paid the bill and could not pay it.

In the case of *Swann v. Sowell*, 2 Barnw. and Ald., 759, Bayley, J., says that if a party admits the debt, and does not say that it is satisfied, or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will, in these cases, raise an implied promise to pay the debt then acknowledged to be due.

The language of Mr. Justice Bayley is not entirely free from doubt. If, by "insufficient excuse," he means an excuse which in itself implies an admission that the debt remains due except for the bar created by the act of limitations, the proposition is undoubtedly supported by the general course of the cases. But if his declaration extends to an excuse, which, if true, furnishes a real objection to the payment of the claim in whole or in part, we think it is laid down too broadly.

Both the English and American cases are very well summed up in a note in 4 Johns., 469, note b. The current of the English decisions seems to be in favor of the principle that any expressions which amount to an admission that the debt was originally due, and has not been paid, will remove the bar created by the act, and revive the original *assumpsit*. The decisions, however, as to this point, have not been entirely uniform. In *Coltman v. Marsh*, 3 Taunt., 380, on a motion to set aside a nonsuit in a case in which the statute of limitations had been pleaded, it appeared that the defendant had said to the plaintiff: "I owe you not a farthing, for it is more than six years since." It was contended that these words ought to have been left to the jury; but the court refused the motion. So in the case of *Leaper v. Tatton*, 16 East, 420, the defendant said "that he had been liable, but was not liable then because the bill was out of date." Lord Ellenborough held, *at nisi prius*, that this might be considered as no more "than pleading the statute of limitations in his own person;" and the verdict was taken on other words spoken at the same time. Yet these words imply very strongly that the debt was originally due and remains unpaid.

Some of the American cases proceed on the idea of a new promise for

which the ancient debt is a sufficient consideration; and this is a distinction of great importance, where the acknowledgment is connected with anything required by the defendant.

In the case of *Clementson v. Williams*, 8 Cranch, 72, this court expressed the opinion that the doctrine of reviving debts barred by the act of limitations had been carried full as far as it ought to be carried, and that the statutes on that subject ought to be construed like other statutes, so as to effect the intention of the legislature. In that case a declaration by one partner that the account was originally due, and that he had never paid it, and did not know that it had ever been paid, but supposed his partner had discharged it, was declared to be insufficient to take the case out of the statute. It is true that the partnership was dissolved when this declaration was made, but the court did not put the case on that point. It was determined on the insufficiency of the acknowledgment.

§ 949. — *if such an acknowledgment or promise be conditional it may create a new assumpsit in consideration of the original debt, but the condition must be performed before the right will accrue.*

We think, upon the principles expressed by the court in the case in 8 Cranch, that an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit* for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.

In the case at bar, the defendant said to one witness that if the plaintiff had come forward and settled certain claims the defendant had against him, he would have given him his powder; and to another he said, "he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant in the court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff."

These declarations do not amount to an unqualified and unconditional acknowledgment that the original debt was justly demandable. They assert a counter-claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered as a new promise for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform, the condition on which the promise was made.

A distinction seems to have been taken in England between a promise to pay a sum of money, and a contract for the performance of a particular act. In *Boydell v. Drummond*, 2 Campb., N. P., 157, Lord Ellenborough said: "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment where the cause of action arises from the doing, or omitting to do, some act at a particular moment in breach of a contract."

But, without placing the cause on this distinction, the court is of opinion

that the original cause of action is not revived, and that there is no error in the judgment.

Judgment affirmed, with costs.

MOORE v. BANK OF COLUMBIA.

(6 Peters, 86-94. 1832.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The only question in this case is whether the evidence offered upon the trial was sufficient to prevent the statute of limitations from barring the action.

The suit was founded upon a promissory note made by the plaintiff in error, bearing date the 25th of April, 1816, by which, sixty days after date, he promised to pay Gilbert Docker, or order, \$500, value received, at the Bank of Columbia.

The note was duly indorsed to the Bank of Columbia, and in July, 1825, a suit was commenced in the circuit court of the United States for the District of Columbia upon that note. The statute of limitations, among other pleas, was interposed; and the plaintiff in the court below, to take the case out of the statute, proved by William A. Rind that, in the summer of 1823, he went into a tavern to read the newspapers, when he saw in the public room the defendant, James Moore, and two companions, drinking, Moore appearing to be elevated with what he had drank; and whilst there looking at the newspapers he overheard a conversation between the defendant and his two companions, in which they were bantering him about his independent circumstances and of his being so clear of debt or of the banks, when the defendant jumped up and danced about the room, exclaiming, "Yes, except one damned \$500 in the Bank of Columbia, which I can pay at any time." No part of this conversation was addressed to the witness. The witness had been a clerk in the bank, but was then in the prison bounds in the city of Washington, and after his discharge from prison he immediately returned to the bank in Georgetown. The witness believed the defendant knew him to be a clerk in the bank. At this time he, the witness, knew the note in question was lying over in bank, and he knows of no other \$500 note of the defendant in that bank but what is paid. The plaintiffs further proved that, upon examination of their books, no other discounted note of the defendant stood charged to him at the time of the conversation referred to by the witness.

Upon this evidence the defendant prayed the court to instruct the jury that the evidence aforesaid did not import such an acknowledgment of the debt in question as was sufficient to take it out of the statute of limitations, which instruction the court refused and permitted the evidence to go to the jury as evidence of an acknowledgment to repel the bar of the statute. The jury found a verdict for the plaintiff. A bill of exceptions was taken to the decision of the court, and the case is brought here by writ of error.

The question as to what shall be a sufficient acknowledgment or promise to take a case out of the statute has frequently received the attention and examination of this court, and the cases both in England and in this country have been critically reviewed. It is deemed unnecessary again to travel over this ground, but it is sufficient barely to apply some of the rules and principles to be extracted from these cases to the facts in the one now before us.

This court, in the case of *Clementson v. Williams*, 8 Cranch, 72, nearly twenty years since, expressed a very decided opinion that courts had gone quite far enough in admitting acknowledgments and confessions to bar the operation of the statute of limitations, and that this court was not inclined to extend them; that the statute was entitled to the same respect as other statutes, and ought not to be explained away. And from the course of decisions in the state courts, as well as in England, such seems to have been the general impression, and they have been gradually returning to a construction more in accordance with the letter as well as the spirit and intention of the statute.

In the case referred to it was laid down as a rule applicable to this question that an acknowledgment of the original justice of a claim was not sufficient to take the case out of the statute, but the acknowledgment must go to the fact that it was still due. And in *Wetzell v. Bussard*, 11 Wheat., 310, it is held that the acknowledgment must be unqualified and unconditional, amounting to an admission that the original debt was justly demandable. If the acknowledgments are conditional, they cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered a new promise, for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance or a readiness to perform the condition on which the promise was made.

This is the doctrine which prevails in the state courts generally. In New York it is held that an acknowledgment, to take a case out of the statute of limitations, must be of a present subsisting debt. If the acknowledgment be qualified so as to repel the presumption of a promise to pay, it is not sufficient evidence of a promise to pay, so as to prevent the operation of the statute. 15 Johns., 511; 6 Johns. Ch., 266, 290.

This question again, recently (1828), came under the consideration of this court, in the case of *Bell v. Morrison*, 1 Pet., 352, and underwent a very elaborate examination; and the leading cases in the English and American courts were reviewed, and the court say, "We adhere to the doctrine in *Wetzell v. Bussard*, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner and be in its terms unequivocal and determinate."

§ 950. *To remove the bar of the statute of limitations the new promise must be an admission of a present subsisting debt, with an express promise to pay it, or circumstances from which it may be fairly implied.*

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations.

The principle clearly to be deduced from these cases is that, in addition to the admission of a present subsisting debt, there must be either an express

promise to pay or circumstances from which an implied promise may fairly be presumed.

And this is the conclusion to which the English courts, after a most vacillating course of decisions, had come before the late act of parliament of George IV., chapter 14. This act shows, in a very striking point of view, the sense of that country of the great mischiefs which had resulted from admitting vague and loose declarations in a great measure to set aside and make void the statute of limitations.

That act (9th May, 1829) recites that whereas various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operations of said enactments (statute of limitations), and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, be it enacted, etc., that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of said enactments or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. Martin's Treatise on act 9, Geo. IV.

Although this act can have no direct bearing upon the question here, it serves to illustrate and confirm the fitness and policy of the course pursued by our courts in cautiously admitting loose verbal declarations and promises to take a case out of the statute of limitations.

§ 951. — *the evidence in the case at bar does not show such a promise.*

If the doctrine of this court, as laid down in the cases I have referred to, is to govern the one now before us, the facts and circumstances given in evidence fall very far short of taking the case out of the statute of limitations. There is no direct acknowledgment of a present subsisting debt; no express promise to pay; nor any circumstances from which an implied promise may fairly be presumed. The declarations of the defendant below were vague and indeterminate, leading to no certain conclusion, and at best to probable inference only; and, indeed, if unexplained by any other evidence, they were senseless. It is left uncertain, even, whether the conversation referred to the note in question. The evidence that this was the only five hundred dollar note of his lying over in the bank might afford a plausible conjecture that this was the one alluded to. But that is not enough, according to the rule laid down in *Bell v. Morrison*; nor is there any direct admission of a present subsisting debt due. The epithet which accompanied the declaration would well admit of a contrary conclusion; and there were some circumstances attending it that would lead him to resist payment. The assertion of his ability to pay is no promise to pay.

The whole declarations taken together do not amount either to an explicit promise to pay, made in terms unequivocal and determinate, or disclose circumstances from which an implied promise may fairly be presumed, one or the other of which this court has said is necessary to take the case out of the statute. The court below therefore erred in not giving the instructions prayed for by the defendant. The judgment must accordingly be reversed, and the cause sent back with directions to issue a *venire de novo*.

REMOVAL OF BAR.—ACKNOWLEDGMENT AND NEW PROMISE. §§ 952-967.

§ 952. **Extension of time.**—An agreement, made upon a valuable consideration by which the payment of notes is deferred, the debtor expressly renouncing the benefit of the statute of limitations, prevents it from running until the time stipulated has expired. *Randon v. Toby*, 11 How., 493 (§§ 1007-9).

§ 953. **A statement that one's note is as good as money** is sufficient to establish a new promise to take the case out of the statute of limitations. *Arnold v. Dexter*,* 4 Mason, 122.

§ 954. **Any offer, on the part of the debtor, operating to remove the bar created by the act of limitations, should, upon a fair interpretation of the meaning of the party, from all that he has said, amount either to a promise or to an acknowledgment of the debt or some debt. Anything which is added, going to negative a promise or acknowledgment, must be considered as qualifying every other expression. If the promise is conditional, the remedy is not revived unless the condition is performed.** *Read v. Wilkinson*,* 2 Wash., 514.

§ 955. **The bare acknowledgment of a debt, without a promise to pay it, will take the case out of the statute of limitations. The law raises the promise.** *Cowan v. Magauran*,* Wall. C. C., 66.

§ 956. **Where there is doubt as to whether declarations and acknowledgments made by a defendant, a United States collector, refer to his individual liability and indebtedness or to that of the government, the question is one for the jury. So held in an action against Samuel Swartwout, an ex-collector of the port of New York, for excess of duties paid under protest, where the plaintiff relied, in order to remove the bar of the statute, in part on certain declarations and acknowledgments alleged to give rise to a new promise.** *Dorr v. Swartwout*,* 1 Blatch., 179.

§ 957. **Where there has been a settlement of a claim and a promise to pay the balance thereof, under Louisiana code a suit is not barred, if brought within a year after such acknowledgment.** *Newell v. Nixon*, 4 Wall., 572.

§ 958. **In an action on a bond by the United States, it is no defense that the bond was given in renewal of another bond for duties, which was more than twenty years old at the time of execution of the second bond, that no demand of payment had ever been made, and that at the time defendants executed the second bond they were advised by plaintiff's agent that there was no defense to the demand.** *United States v. McKewan*, 4 Blatch., 383.

§ 959. **Waiver.**—Evidence of a promise which does not revive the debt is more easily accepted than evidence of a new promise which operates as a waiver of the statute of limitations. *In re Reed*, 6 Biss., 250.

§ 960. **Although limitation may have run against a special contract, a subsequent promise to pay is not barred.** *Ames v. Le Rue*, 2 McL., 216.

§ 961. **Where a party acknowledges a debt but refuses to pay unless compelled by law, this will not remove the bar of the statute.** *Jenkins v. Boyle*,* 2 Cr. C. C., 120.

§ 962. **Where an account in bar is only a statement of debts against the plaintiff, it will not remove the bar of the statute, although the last item is a payment made within three years.** *Chew v. Baker*, 4 Cr. C. C., 696.

§ 963. **By heir.**—Although a promise by a party to pay his own debt, which is barred by the statute of limitations, is valid, a promise by an heir to pay a debt of his ancestor, which was barred at the death of the ancestor, is void for want of consideration. *Didlake v. Robb*, 1 Woods, 682.

§ 964. **A promise of the drawer of a bill of exchange, which has been dishonored and protested for non-acceptance, that he will pay the bill, in order to take it out of the statute of limitations must be a valid one, must be clearly made out by proof, must be absolute, and should appear to have been made upon a full knowledge of the facts, which the promise is supposed impliedly to admit.** *Craig v. Brown*, 3 Wash., 506.

§ 965. **Recitals in a deed.**—In answer to a plea of the statute of limitations, a deed of defendant, containing a recital that the plaintiff and others had paid his debt for which he desired to secure them, was offered in evidence. The statutory limitation of five years had not elapsed since the execution of the deed. It was held that the deed was evidence of the debt, and the recital in it was a sufficient admission to take the debt out of the statute. *King v. Riddle*,* 7 Cr., 168.

§ 966. **A clause in a will directing the payment of debts does not take a case out of the statute of limitations.** *Wilson v. Turberville*,* 1 Cr. C. C., 512.

§ 967. **Requisites of acknowledgment.**—The acknowledgment of indebtedness, to remove the bar of the statute of limitations, must be clear and unequivocal and without condition in order to allow a promise to pay to be implied. But if terms of payment are connected with the acknowledgment the new remedy is on the terms proposed. The action must be brought and sustained on the new promise, with no reference to the old promise, which is barred, than as the condition of the new promise. *Kampshall v. Goodman*,* 6 McL., 189.

§ 968. **Promise to pay when able.**—In an action of *assumpsit* on a note, to which the statute of limitations was pleaded, and the debtor had promised, within three years, to pay when he should be able, it was held that proof of his ability need not be made. *Davis v. Van Zandt*,* 2 Cr. C. C., 208.

§ 969. **Conditional promise.**—If a new promise to pay a debt barred by the statute of limitations be conditional, it cannot be given in evidence in a suit brought on the original cause of action. *Lonsdale v. Brown*, 3 Wash., 406.

§ 970. **An offer, after suit brought, to pay plaintiff's agent upon terms which he was not authorized to accept, will not remove the bar of the statute.** *Hamilton v. Carnes*,* 4 Cr. C. C., 531.

§ 971. **An offer to give a note for one-half the debt due, to be paid at debtor's convenience, will not remove the bar of the statute.** *The Bank v. Sweeny*,* 3 Cr. C. C., 293.

§ 972. **The expression of a willingness to pay a debt if a claim due from one of the plaintiffs should be allowed as a set-off will not remove the bar of the statute.** *Nicholls v. Warfield*,* 2 Cr. C. C., 429.

§ 973. **Indorsements of credits on a bond are not sufficient acknowledgments of indebtedness to take the debt out of the statute of limitations as against an administrator in Louisiana.** So held in an action against an administrator on a bond on which payments of interest up to 1863 had been indorsed. A statute prohibited parol evidence to prove any acknowledgment or promise of a party deceased against his succession, to pay any debt, and required such acknowledgments to be in writing and signed by the party to be charged, or his authorized agent. *Adger v. Alston*,* 15 Wall., 555.

§ 974. **Statement of no funds.**—A statement made by an administrator that there are no funds with which to pay his intestate's debts is not an acknowledgment of a specific debt, or promise to pay it, so as to take it out of the bar of the statute of limitations. *Thompson v. Peter*,* 12 Wheat., 565.

§ 975. **Refusal to pay.**—An acknowledgment to revive a cause of action must, by the statute of Kansas, be in writing and signed by the party, and must be of an existing liability with respect to the contract which is sought to be revived. In an action on a promissory note the plaintiff attempted to rebut the plea of the statute of limitations by giving in evidence letters in substance as follows: "I am surprised at your having possession of that collateral note. I tell you now it will never be paid. I wrote Messrs. Grant & Smith, attorneys, at one time that I would give \$200, which they refused to accept. I thought then and think now that is all I ought to give. How much does your client want?" It was held insufficient. *Barlow v. Barner*,* 1 Dill., 418.

§ 976. **Including debt in insolvent's schedule.**—The including of a debt in an insolvent's schedule of debts is not such an acknowledgment as will take the debt out of the statute of limitations. In order to remove the bar, it is necessary that there should be either an express promise to pay or an admission of the debt, made in such terms as would imply that the party was liable and willing to pay. So held where the admission relied on to take the debt out of the statute was that it was contained in a list of debts filed with their petition by the defendants upon their application to the commissioners for the benefit of the act passed for the relief of insolvent debtors. *Georgia, etc., Co. v. Ellicott*,* Taney, 130.

§ 977. **Compromise.**—The offer of terms of compromise is not sufficient to take the case out of the statute of limitations. So held in a case where, to take the claim out of the statute, there was offered evidence that the defendant's intestate, when offering a compromise, acknowledged the debt to be due by himself and another, and offered to pay one-half, although he was discharged by the insolvent law of Missouri, if plaintiff would give him time. *Neil v. Abbott*,* 2 Cr. C. C., 193.

§ 978. **An offer to compromise will not remove the bar of the statute.** *Ash v. Hayman*,* 2 Cr. C. C., 452.

§ 978a. **An acknowledgment by defendant that the note was his, that it was unpaid, and that he should resist payment, but offering some kind of a compromise, will not take the case out of the statute.** *Rhodes v. Hadfield*,* 2 Cr. C. C., 566.

§ 979. **Partners after dissolution.**—An acknowledgment of the original justice of a debt by a partner after the dissolution of the partnership will not take the debt out of the statute of limitations against the other partners. So held in a suit instituted against Williams and Clarke, as partners, the writ being only executed on Williams, who pleaded the act of limitations. To rebut this, evidence was offered that, before the suit was brought, Clarke had stated to a person, making a demand upon him for the account, that it was due and he supposed it had been paid by Williams, but had not paid it himself and did not know of its ever being paid. The firm was dissolved before the acknowledgment was made. *Clementson v. Williams*,* 8 Cr., 72.

§ 980. *Insufficient.*—The statute of limitations having been pleaded, evidence was offered that defendant had said he had received the goods and paid for them by a check on a bank in Washington, and referred to the teller of the bank. *Held*, not to take the case out of the statute. *Reynolds v. Calvert*,* 3 Cr. C. C., 211.

§ 981. To take his case out of the statute of limitations, A., the plaintiff, offered in evidence the defendant's letter to the secretary of the navy, in which he says, "I could have availed myself of the insolvent laws of the District, but preferred paying all debts as soon as possible, not omitting A.'s claim." *Held*, that this was not a sufficient acknowledgment to take the case out of the statute. *Archer v. Poor*, 5 Cr. C. C., 542.

§ 982. *Suit against collector—Instructions by secretary of the treasury.*—A suit was brought by A. against B. to recover an excess of duties paid under protest to the latter as collector. After judgment rendered for the plaintiff, the court referred the matter to the officials of the custom-house: they certified to the clerk the amount due and judgment was entered in pursuance of that certificate. Subsequently, upon discovery that various items had been omitted from the adjustment, for which he was entitled to recover, plaintiff brought suit against B. for the deficiency, to which the statute of limitations was interposed. *Held*, that instructions from the secretary of the treasury to the various collectors, delivered after defendant had been out of office a number of years, and prior to the passage of the law declaring that a judgment against a collector cannot be enforced against him so far as it binds his property, but can only be satisfied out of the treasury department, was not such a new promise as would take the case out of the statute. *Crooke v. Maxwell*,* 5 Int. Rev. Rec., 69.

§ 983. The plaintiffs had claims to be repaid excess of duties paid by them under protest upon certain goods imported, and the defendant, ex-collector of the port of New York, was liable therefor. The statutes of limitation were about to take effect as a bar to an action for such excess, and the plaintiffs contemplated bringing suits. An officer in the New York custom-house stated to the plaintiffs' attorney that by the rules and practice of the treasury department the presentation of their claims to the auditor, or to the refunding clerk at the custom-house, prevented the running of the statute of limitations, and, if so prevented, and suit was thereafter brought, that statute could not be, and would not be, interposed as a defense. The defendant, disclaiming any control in the matter, but declaring his confidence in the experience and knowledge of such officer, expressed to the attorney his concurrence in the statement and opinion thus given. The plaintiffs did present their claims, and in reliance upon the recognition by the secretary of claims of the like nature, and upon the statements and opinion of such officer, and the concurrence of the defendant therein, refrained from bringing suit until after the statute had run against all the claims. Suits having been then brought, and the defendant having interposed the statute of limitations as a bar, the complainants, seven years and upwards after these pleas of the statute of limitations were filed, applied to the court as a court of equity to restrain the defendant from insisting upon the statute as a defense. Upon demurrer to the bill for want of equity, *held*, that the bill must be dismissed. *Andrae v. Redfield*, 12 Blatch., 407.

§ 984. The statute of limitations of the state of New York declares (Code of Procedure, section 110) that "no acknowledgment or promise shall be sufficient evidence of a . . . continuing contract whereby to take the case out of the operation of" the statute, "unless the same be contained in some writing signed by the party to be charged thereby." Under which the state courts hold that a parol agreement not to plead the statute cannot operate as an acknowledgment of the debt, nor as a new promise, nor as a waiver of the statute, nor as an *estoppel in pais* to preclude the defense when relied on under circumstances similar to the above. Hence, under the rule that courts of the United States recognize and give effect to the statute of limitations of the states in which those courts exercise their jurisdiction, it was held that the facts alleged in the bill created no estoppel as against the government or as against the defendant. *Ibid*.

§ 985. An implied promise to pay a debt barred by the statute of limitations may be created by a clear and unqualified acknowledgment of the debt; but such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague or indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, such testimony ought not to go to the jury as evidence of a new promise to revive the cause of action. *Otterback v. Brown*,* 2 MacArthur., 541.

§ 986. A declaration by the defendants to the marshal, at the time of serving the writ (which did not specify the cause of action nor its amount), that they would pay the debt if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act, is not sufficient to take the case out of the act of limitations, although the defendants were not arrested upon other judgments; but if the cause of action

and its amount were mentioned to them at the time of such declaration, it may be left to the jury, and if they should find that the promise referred to that particular cause of action, it would be sufficient in law to take the case out of the statute. *Young v. Wetzell*, 3 Cr. C. C., 359.

§ 987. **Casual acknowledgment to stranger.**—The court refused to instruct the jury that the casual acknowledgment of the debt to a stranger is not such an acknowledgment as was sufficient to take the debt out of the statute of limitations. *Bank of Columbia v. Moore*, 3 Cr. C. C., 668.

§ 988. **Competency of witness.**—In an action by the indorsee of a promissory note against the maker, the indorser is a competent witness for the plaintiff (without a release) to prove an acknowledgment of the debt so as to take the case out of the statute of limitations. *Bank of Alexandria v. Clarke*, 2 Cr. C. C., 464.

§ 989. **An acknowledgment by congress of a debt due from the United States, to constitute a promise sufficient to take the case out of the statute of limitations, must be unqualified, unconditional and show positively that the debt is due in whole or in part.** An acknowledgment of the original justice of the claim will not take the case out of the statute. The government entered into a contract with A. by which he agreed to construct a warehouse to be rented by the government. A. transferred all his interest in the contract to B. and the government entered into possession. But having abandoned the premises before the expiration of the lease, B. filed his petition claiming the rent due him up to the 14th of November, 1856. Upon which petition an adverse report was made, on the ground of irregularities in the transfer of the lease from A. to B. Congress then passed a resolution for the relief of B., remanding the cause to the court of claims, and authorizing the court to render judgment in his favor, notwithstanding any technical defect in the assignment of the lease, if it should appear that he was the equitable owner of the lease and in justice and equity entitled to the rents (if any) due thereon from the United States. Upon the cause being heard judgment was rendered in B.'s favor in 1866. Later in the same year he filed another petition claiming the balance of the rents accruing from and after the 14th of November, 1856, till the 15th of January, 1861, to which the statute of limitations, act of March 3, 1863 (12 Stat. at L., 765, sec. 10), was interposed. *Held*, (1) that, as the claim might have been prosecuted prior to the passage of the resolution of congress, in the name of the assignor of the lease, the statute began to run from the time the claims first accrued; (2) that the resolution of congress gave no new cause of action, and therefore that the claims must be deemed to have accrued, not at the date of the resolution, but at the times when they became due under the lease. *Cross v. United States*,* 4 Ct. Cl., 271.

§ 990. **An act of congress acknowledging and reviving a claim against the United States barred by a statute of limitation, but containing a proviso that no more than a certain sum should be paid, does not remove the bar of the statute except as to such sum.** *Richardson v. United States*,* 10 Law Rep. (N. S.), 632.

§ 991. **Consideration.**—A verdict and judgment against the plaintiff in a former suit upon a bill of exchange is no evidence of a want of consideration for a new promise to pay it, where such former suit was decided, not upon the validity of the bill, but upon the act of limitations. A debt barred by operation of law, or by the statute of limitations, is a good consideration for a new promise. *Lonsdale v. Brown*, 4 Wash., 86.

§ 992. **Question of law and fact.**—Whether the evidence of a promise to pay a debt, barred by the statute of limitations, is sufficient to take a case from the operation of the statute, is a question of law for the court. Whether the evidence applies to the debt in suit, or to what portion of it, is a question of fact for the jury. Where A., who was in the employment of B., spoke of leaving, and said, "I want to see my money," to which B. replied, "I will put up your wages for you," *held*, that the promise was sufficient to take the case out of the statute of limitations, for all the wages to which the promise applied; and that it was properly left to the jury to determine to what portion of the wages, if any, the promise did apply. *Penaro v. Flournoy*,* 9 Law Rep., 269; 5 Pa. L. J., 555.

§ 993. **Acknowledgment and refusal.**—The acknowledgment of the original cause of action, accompanied by a refusal to pay unless compelled by law, will not take the case out of the statute of limitations. *Jenkins v. Boyle*,* 2 Cr. C. C., 120.

§ 994. **Promise held sufficient.**—Where the defendant said he thought the plaintiff had charged up the note to his account, and if that was not the case he would "attend" to it, *held*, that this was sufficient to rebut the plea of the statute of limitations. *Bank of Alexandria v. Clarke*, 2 Cr. C. C., 464.

§ 995. **Suit on old debt.**—On a new promise by the debtor to pay a continuing debt, the creditor may sue on the old debt and give the new promise in evidence to avoid the act of limitations, or may sue upon the new promise; but if the new promise be conditional, it cannot be given in evidence in a suit for the old debt. *Lonsdale v. Brown*, 4 Wash., 148.

2. *Part Payment.*SUMMARY—*Payment of a part of a debt, § 996.*

§ 996. Payment of a part of a debt does not of itself prevent the statute of limitations from running against the residue. *United States v. Wilder, § 997.*

[NOTES.— See §§ 998–1001.]

UNITED STATES *v.* WILDER,

(18 Wallace, 254–257. 1871.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.— *Wilder* had a claim on the United States, the amount due being contested. Part of it was paid within six years preceding the bringing of his suit. The court below held that the payment took the case out of the statute.

Opinion by MR. JUSTICE DAVIS.

We think the court of claims erred in deciding that the claimant was not barred by the provision in the act reorganizing that court. The claim accrued on the 31st of July, 1863, because the services were rendered at that time. The petition was not filed until six years afterwards. The claim was, therefore, barred by the statute, unless, in some way, taken out of it. It is insisted that this has been done by a payment of a portion of the demand within the six years, and this presents the only question for consideration.

This court has not adopted the rule of decision made at one time in England (see *Trueman v. Fenton*, Cowp., 548; *Quantock v. England*, 5 Burr., 2628; *Yea v. Fouraker*, 2 id., 1099), and to some extent in this country, under which, by a constructive equity, judicial refinements came near to abolish the statute altogether. On the contrary, following the decisions of the English courts (*Dickson v. Thomson*, 2 Shower, 126; *Andrews v. Brown*, Prec. in Ch., 385; *Williams v. Gun*, Fortesque, 177; *Bland v. Haselrig*, 2 Vent., 152; and *Benyon v. Evelyn*, A. D. 1664, Sir Orlando Bridgman's Judgments, 324, all referred to in Angell on Limitations, pp. 18, 212, fifth edition, 1869), made more immediately after the passage of the statute of James I., we have sought to give to it full effect. In 1814, Marshall, C: J., delivering the judgment of this court, declared (*Clementson v. Williams*, 8 Cranch, 72) that the statute of limitations was entitled to the same respect as other statutes, and should not be explained away. The same doctrine has been asserted in subsequent decisions. *Bell v. Morrison*, 1 Pet., 351 (§§ 940–47, *supra*); *McCluny v. Silliman*, 3 id., 270.

§ 997. *Payment of part of a debt does not of itself prevent the statute of limitations from running against the residue.*

It results from these cases that a promise to pay cannot be inferred from the mere fact of payment of part of a debt, there being nothing to raise a presumption that it was a payment on account of this debt. The principle on which part payment takes a case out of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. It is too plain for controversy that the payment in question was not intended as an acknowledgment of the demand sued for. Instead of being applicable to an admitted debt, it was in denial of the right to further payment. The sum paid was the exact amount due under the written agreement, and was in discharge of the obligation im-

posed by it. That agreement was acknowledged, while the verbal arrangement made by the assistant quartermaster was repudiated. It is difficult to see how a payment in full of an admitted contract can be converted into an acknowledgment of one which was denied.

The case of the claimant is in some of its aspects worthy of consideration, but as it was not filed in the court of claims until barred by the statute, we are not at liberty to discuss its merits. Judgment reversed, and the cause remanded to the court of claims, with directions to dismiss the petition.

§ 998. *Part payment.*—In an action upon eleven notes, made in 1857, where, in 1866, the debtor gave the holder a sum of money, with directions to pay a part on other claims, and to apply the balance on the debt or notes due him, and he applied the amount in equal sums towards the payment of all the notes by indorsing the payment on each, which resulted in the removal of the bar of the statute, it was held that the creditor had the right to make the application in the manner he did even without direction. *Jackson v. Burke*,* 1 Dill., 311.

§ 999. Under the statute of limitations of California, a part payment will take a contract out of the statute. The part payment need not be evidenced by writing. Thus, in an action on a promissory note brought in California, to which the defendant set up the statute of limitations and the plaintiff relied on a part payment to remove the bar of the statute, it was held that the plaintiff was entitled to judgment. *Palmer v. Andrews*,* 1 McAl., 491.

§ 1000. A part payment by an executor will not remove the bar of the statute as against a devisee. So held in an action of debt against the devisee of an obligor of a bond which had been due more than twelve years, and to which the defendant pleaded the statute of limitations of twelve years, and to which plea plaintiff replied a payment by the executor of the obligor within twelve years. *Gilpin v. Plummer*,* 2 Cr. C. C., 54.

§ 1001. Where a partial payment is made on a debt and suit is afterwards brought to recover the balance due, the statute of limitations will be deemed to have run against the claim from the time the original claim, embracing that portion of the debt already paid, accrued, and not merely from the time when the payment was made, unless it appear that the party paying intended to acknowledge and admit the greater debt to be due. *Buckley v. United States*,* 8 Ct. Cl., 517.

X. SUSPENSION OF THE RUNNING OF THE STATUTE.

SUMMARY — *Agreement to renounce benefit of statute*, § 1002.—“*Beyond seas*,” § 1003.—*Estates of decedents*, § 1004.—*Effect of action commenced*, § 1005.—*Effect of a state of war*, § 1006.

§ 1002. An agreement, made upon a valuable consideration, by which the payment of notes is deferred, the debtor renouncing the benefit of the statute of limitations, prevents it from running until the time stipulated has expired. So held in an action upon certain notes dated in June, 1841, and payable in one and two years, where the debtor entered into an agreement in March, 1844, to apply certain portions of the proceeds from certain crops in extinguishment of the debts. *Randon v. Toby*, §§ 1007-9.

§ 1003. The phrase “beyond the seas,” as used in the North Carolina statute of limitations, means beyond the boundaries of the United States. So held where an action was brought to acquire an interest in the proceeds of a sale, which took place in June, 1853, of a tract of land in North Carolina. The claimant had lived within the United States, but without that state. *Davie v. Briggs*, §§ 1010-13.

§ 1004. Where a statute of limitations requires actions to enforce a statutory liability to be commenced by a certain date, and another statute allows creditors of a decedent one year after the qualification of executors or administrators within which to present their claims, and prohibits suits to recover debts to be brought before its expiration, the latter statute will be held to suspend the operation of the statute of limitations for that year. So held in an action upon a statutory liability for the insolvency of a bank of which defendant's testator was a stockholder. The act of March 16, 1869, required the action to be commenced before January 1, 1870. The defendant's testator died in 1868, but no letters of administration were issued on his estate in Georgia until August 9, 1869. Another statute prohibited actions to recover debts of decedent until after a year after the issuing of letters. The action was commenced December 30, 1870. *Mills v. Scott*, §§ 1014-16.

§ 1005. An action commenced and prosecuted to judgment against the executors of a decedent, appointed and acting in one state, will be, in effect, a judicial interpellation of the

running of the statute of limitations against other executors of the same decedent who qualify and act in another state. *Hill v. Tucker*, §§ 1017-21. (a)

§ 1006. The operation of the statute of limitations is suspended during the continuance of war. So held where an action was commenced in 1865 upon a debt which accrued before the 25th day of October, 1859, and the courts had been closed to plaintiff from the 6th day of May, 1861, to the 1st day of January, 1865. The defendant was an actual resident of Arkansas all this time, and the plaintiffs of New Hampshire. *Hanger v. Abbott*, §§ 1022-27.

[NOTES.— See §§ 1028-1094.]

RANDON v. TOBY,

(11 Howard, 493-521. 1850.)

ERROR to U. S. District Court, District of Texas.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.— Had this case been conducted on the principles of pleading and practice known and established by the common law, a short declaration in *assumpsit*, a plea of *non assumpsit*, and *non assumpsit infra sex annos*, would have been sufficient to prepare the case for trial on its true merits. But, unfortunately, the district court has adopted the system of pleading and code of practice of the state courts; and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers and exceptions,—a wrangle in writing extending over more than twenty pages, and continued nearly two years,—in which the true merits of the case are overwhelmed and concealed under a mass of worthless pleadings and exceptions, presenting some fifty points, the most of which are wholly irrelevant, and serve only to perplex the court, and impede the due administration of justice. The merits of the case, when extricated from the chaos of demurrers and exceptions in which it is enveloped, depend on two or three questions, simple and easily decided. We do not deem it necessary, therefore, to inquire whether the court below may have erred in their decision of numerous points submitted to them, which have no bearing on the merits of the case, and are of no importance to the just decision of it. It will be unnecessary to decide whether the judge erred in his construction of the laws of Africa and other questions of a similar character, provided it shall appear that, on the admitted facts of the case, he should have instructed the jury that the defendant had established no just defense to the plaintiff's action.

On the trial, the plaintiff gave in evidence two notes executed by defendant, and purporting to be for value received, payable to the plaintiff or his order. They were dated in June, 1841, and payable in one and two years. Three distinct defenses were set up by defendant, which had some apparent foundation of fact to support them; a fourth, that the defendant had paid the notes to McKinney, the agent of the plaintiff, being proved to be false in fact, need not be further noticed.

1. The first was the statute of limitations of four years of the state of Texas. 2. That the plaintiff had made an assignment of all his property to his creditors, and therefore had no right to recover. And 3. That the notes were given for the purchase of negroes imported from Africa to Cuba, and thence to Texas in 1835, and consequently that the defendant had received no consideration, because the negroes, being imported contrary to law, were entitled to their freedom. We shall notice these points of defense in their order.

(a) The case of *Goodall v. Tucker*, 18 How., 469, arose on similar facts, and was decided in the same manner as that of *Hill v. Tucker*.

§ 1007. *An agreement made upon a valuable consideration by which the payment of notes is deferred, the debtor expressly renouncing the statute of limitations, prevents it from running until the time stipulated has expired.*

1. The plea of the statute of limitations was *prima facie* good as to one of the notes, as suit had not been instituted till more than four years after it became due. But the plaintiff rebutted this plea by the exhibition of the following agreement, signed by Randon, the defendant:

"This instrument of March 14, 1844, witnesseth: That whereas McKinney and Williams, of Galveston, and Thomas F. McKinney, agent of Thomas Toby, of New Orleans, hold several notes drawn by me, and past due; and Thomas F. McKinney, some two years since, did agree for McKinney and Williams, and the said Thomas Toby, to grant me further indulgence on said notes, over and above the time of their maturity; and I did then say, promise and agree that I would deliver to him, the said Thomas F. McKinney, each and every year, all the one half of every crop of cotton in payment, first of the amount due the said McKinney and Williams, if there be anything due them over and above the amount of purchase of negroes bought of them, and then in extinguishment of said amount of purchase of negroes, of which my note to said Toby is a part of consideration; and I further agree and oblige myself that any surplus I may have from the proceeds of the other half of my crops, over and above my wants, exclusive of any speculations or purchase of negroes, shall also be turned over as above; and I further bind and obligate myself, my heirs, assigns and administrators, that no advantage shall be taken, or any plea of statute of limitations be made, to avoid the payment of said notes, but they shall be and remain in as full force and effect as though they were renewed.

D. RANDON."

This agreement, being founded on a good consideration and accepted by the plaintiff, became incorporated in the notes, and formed a part of the contract, by mutual consent. It extended the time of payment, and the statute did not begin to run till the extended time had expired. It operated also by way of estoppel *in pais* to a defense under the statute of limitations. Otherwise the defendant would gain an advantage by his own fraud, or put the plaintiff to an action on the agreement. On one or the other of these principles the doctrine of estoppel has its foundation. The plea of the statute is a breach of the agreement, and to avoid circuitry of action it may be set up in avoidance of the plea. Moreover, the stipulation in this agreement forms a new promise on good consideration to pay the money, which has always been held as a sufficient replication to the plea of the statute of limitations.

It has been a subject of complaint in this case also, that the court submitted the construction of this instrument of writing to the jury. But the defendant cannot allege this as error. First, because it was done at his own request; and secondly, because the court should have instructed the jury that the construction contended for by the defendant was wholly without foundation. The use of the word "note," in the singular number, instead of "notes," is so palpable a slip of the pen, that its use, although furnishing an opportunity for cavil, could not be said to create an ambiguity on the face of the instrument, or leave any doubt as to its true intent in the mind of any one who will read the whole of it together and has no intent or desire to pervert it. It refers to "several notes," it acknowledges that "further indulgence was granted on said notes," and "obligates" the defendant not to plead the statute of limitations to "said notes." Both the notes to Toby were admitted to be part of

the consideration paid for the purchase of the negroes referred to in the agreement; consequently the use of the word "note" was a mere error in grammar or slip of the pen.

By the settlement with McKinney and the firm, and payment of the notes held by them against the defendant, this paper became useless and inoperative as to them; but as there is no pretense that the notes of Toby were paid, the surrender of the agreement to Randon would have been a fraud on Toby, and the promise of McKinney to do so cannot invalidate its legal effect.

§ 1008. *An insolvent appointed "syndic" on his own estate has a right to sue on notes due to him while solvent.*

2. The record given in evidence to show the insolvency of Toby and his assignment under the proceedings in Louisiana, after the purchase of the negroes and before the notes now in suit were given, constituted no legal defense to the action. The taking of the note payable to Toby was no fraud on the defendant; Toby was himself one of the syndics or assignees to settle his insolvent estate; he had a right to secure the debt and give an acquittance for it, and whether he took the note payable to himself individually or as syndic, and whether he has accounted for it to his creditors, or may be bound to do it hereafter when the money is received, are questions with which the defendant has no concern whatever.

§ 1009. *It is no defense to an action for the price of personal property that the title is not good, unless it be supported by proof of eviction.*

3. The plea that the notes were given for African negroes imported into Texas after the year 1833 is equally unavailable as a matter of defense with those already mentioned. This fact seems to have been alleged in the pleadings as showing a want of consideration. On the argument here, it was endeavored to be supported on the ground that the notes were void, because the introduction of African negroes, both into Cuba and Texas, was contrary to law. But in neither point of view will these facts constitute a defense in the present case. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void, and the court would give no remedy to the offending party, though both were *in pari delicto*. But Toby or his agent, McKinney, had no connection with the person who introduced the negroes contrary to law. Neither of the parties in this case had anything to do with the original contract, nor was their contract made in defiance of law. The buying and selling of negroes in a state where slavery is tolerated, and where color is *prima facie* evidence that such is the *status* of the person, cannot be said to be an illegal contract and void on that account. The crime committed by those who introduced the negroes into the country does not attach to all those who may afterwards purchase them. It is true that the negroes may possibly, by the laws of Texas, be entitled to their freedom on that account. If the defendant had shown that the negroes had sued out their freedom in the courts of Texas, it would have been a good defense. In every sale of personal property there is an implied warranty of title, for a breach of which a vendee may sue his vendor and recover the price paid, and on a suit for such price may plead want of consideration or eviction by a better title. But that is neither alleged nor proved in the present case. On the contrary, the defendant held and enjoyed the negroes, and sold them and received their value; and the negroes are held as slaves to this day, if alive, for anything that appears on the record. As respects the defendant, therefore, he has received the full consideration of his notes, the title to his property has

never been questioned, nor has he been evicted from the possession, or threatened with eviction. Consequently he has no right to set up a defense under the implied warranty of title or for want of consideration.

If the defendant should be sued for his tailor's bill, and come into court with the clothes made for him on his back, and plead that he was not bound to pay for them because the importer had smuggled the cloth, he would present a case of equal merits, and parallel with the present; but would not be likely to have the verdict of the jury or judgment of the court in his favor.

The defendant has brought these negroes in the condition of slaves *de facto*, with the *prima facie* evidence of their *status* imprinted on their forehead; he has held them as slaves, he has sold them as such, and he has no right to call upon the court in a collateral action, to which neither the slaves nor their present owners are parties, to pronounce on the question of their right to freedom, especially in support of a defense which has so little to recommend it.

Having thus examined the merits of this case, and shown that the court ought to have instructed the jury to find for the plaintiff on the admitted facts of it, we think it wholly unnecessary to examine further the multitude of demurrers or exceptions spread over the record, as no decision of the court below upon them could have wronged the defendant or affected the merits of the case. The judgment of the court below is therefore affirmed, with costs.

DAVIE v. BRIGGS.

(7 Otto, 628-642. 1878.)

ERROR to U. S. Circuit Court, Western District of North Carolina.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The appellants, as the heirs-at-law of Allen Jones Davie, deceased, assert an interest in the proceeds of a sale which took place in June, 1853, of a tract of land in Guilford county, North Carolina, known many years ago as the McCulloch gold-mine.

Whether the defense, so far as it rests upon the statute of limitations of North Carolina, can be sustained, depends upon the evidence as to the time when Allen Jones Davie died. The learned counsel for appellants insist that, consistently with the legal presumption of death after the expiration of seven years, without Allen Jones Davie being heard from by his family and neighbors, the date of such death should not be fixed earlier than the year 1858. In that view,—excluding from the computation of time the war and reconstruction period between September 1, 1861, and January 1, 1870, as required by the statutes of North Carolina (*Johnson v. Winslow*, 63 N. C., 552),—the suit, it is contended, would not be barred by limitation.

§ 1010. *When death will be presumed.*

The general rule undoubtedly is, that "a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." Stephen, *Law of Ev.*, ch. 14, art. 99; 1 Greenl. *Ev.*, sec. 41; 1 Taylor, *Ev.*, sec. 157, and authorities cited by each author. But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death in fact occurred within the seven years. If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the

range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years. Mr. Taylor, in the first volume of his Treatise on the Law of Evidence (sec. 157), says that, "although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life."

These views are in harmony with the settled law of the English courts. *In re Phene's Trust*, Law Rep., 5 Ch., 139; *Hopewell v. De Pinna*, 2 Camp. N. P., 113; *Reg. v. Lumley*, Law Rep., 1 C. C., 196; *Re Lewes' Trusts*, Law Rep., 11 Eq., 236; 32 Law J. Ch., 104; 40 id., 507; 29 id., 286; 37 id., 265. In the leading case in the court of exchequer of *Nepean v. Doe dem. Knight* (2 Mees. & W., 894), in error from the court of king's bench, Lord Denman, C. J., said: "We adopt the doctrine of the court of king's bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." To the same effect are Mr. Greenleaf and the preponderance of authority in this country. 1 Greenl. Ev., sec. 41; *Montgomery v. Bevans*, 1 Saw., 653; *Stevens v. McNamara*, 36 Me., 176; *Smith v. Knowlton*, 11 N. H., 191; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *Luing v. Steinman*, 1 Metc. (Mass.), 204; *McDowell v. Simpson*, 1 Houst. (Del.), 467; *Whiting v. Nicholl*, 46 Ill., 230; *Spurr v. Trumble*, 1 A. K. Mar. (Ky.), 278; *Doe ex dem. Cofer v. Flanagan*, 1 Ga., 538; *Smith v. Smith*, 49 Ala., 156; *Prim v. Stewart*, 7 Tex., 178; *Gibbes v. Vincent*, 11 Rich. (S. C.), 323; *Hancock v. American Life Ins. Co.*, 62 Mo., 26, 121; *Stouvenal v. Sepkins*, 2 Daly (N. Y.), 319; *McCartee v. Camee*, 1 Barb. (N. Y.) Ch., 456. And such seems to be the settled doctrine in North Carolina. In *Spencer v. Moore*, 11 Ired., 160, the chief justice of the supreme court of that state said: "The rule as to the presumption of death is, that it arises from the absence of the person from his domicile without being heard from for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of as a matter of fact according to the circumstances, which may tend to satisfy the mind that it was at an earlier or later day." The question again arose in the subsequent case of *Spencer v. Roper*, 13 id., 333, 334, when that court reaffirmed *Spencer v. Moore*, and referring with approval to the doctrine announced by the court of king's bench in *Doe dem. Knight v. Nepean*, 5 Barn. & Adol., 86, same case as 2 Mees. & W., 894, *supra*, said: "Where a party has been absent seven years without having been heard of, the only presumption arising is that he is then dead,—there is none as to the time of his death."

§ 1011. *When death will be presumed in a less period than seven years.*

We therefore follow the established law when we inquire whether, according to the evidence, Allen Jones Davie died at an earlier date than at the end or expiration of the seven years when the legal presumption of his death arose. It seems to us that, upon the showing made by the complainants themselves, the conclusion is inevitable that he died some time during the year 1851. As early as July 23, 1853, a written notice was given to Peters, Sloan & Co., in

which they were advised that Colonel Cadwalader Jones and the children of Allen Jones Davie claimed an interest in the proceeds of the sale made by them and Beckham in June, 1853, to the Belmont Mining Company. That notice was signed by "Ralph Gorrill, sol'r of C. Jones and the heirs of A. J. Davie, dec'd." The notice is produced and relied upon by the complainants in support of their claim."

Further, in the seventh paragraph of the complainants' bill they say, "That the said Allen Jones Davie departed this life, as it is believed, some time in the year 1851, but the precise date of his death is not known, nor can any direct proof be obtained, nothing having been heard from him since the — day of November, 1851, when some of a party with whom he had undertaken a journey by land to California, through the country of hostile Indians, returned, saying that the party had been some time fighting the Indians when they left, but that said Allen Jones Davie, with the rest of the party, resolved to press on and fight their way across the country, in which struggle it is believed that he, with the rest of the party, perished, as none of them have ever been heard of since." Again, in the deposition of Cadwalader Jones, Jr., we find this language: "As to Allen Jones Davie, the precise time of his death has never been ascertained, but he perished (it is supposed) in the Indian Territory, April or January, in the year 1851, and has never been heard of since." But this is not all the evidence in the record upon this point. In a statement of "admitted facts," filed in the cause, we find the following: "That the time of the death of Allen Jones Davie is not known, but his death is supposed to have happened late in the fall of 1851, say 1st of December, since which time he has not been heard from."

In view of this evidence, we cannot accept as absolutely controlling the legal presumption which, in regard to Allen J. Davie's death, arose at the expiration of seven years from the time when he was last heard from. We cannot determine the rights of the parties upon the hypothesis that his death occurred in the year 1858, when the appellants themselves and their chief witnesses not only unite in declaring their belief that he died in 1851, but state facts which fully justify that belief. Concluding, then, as we must, that he died in the year 1851, it seems clear that the claim set up in the bill to an interest in the proceeds of the sale of June, 1853, is barred by the limitation of three years prescribed by the North Carolina statute; and it does not appear that any of the complainants are protected by the savings made in the statute for the benefit of infants and *femes covert*.

But it is contended that, in view of the absence of the appellants from North Carolina for many years prior to the sale of 1853, and their continuous absence since that date, their rights are protected by the saving in the North Carolina statute in favor of persons who, having causes of action, were "beyond the seas" when they accrued.

§ 1012. *Interpretation of "beyond the seas" in the North Carolina statute.*

We are not unaware of the construction which this court has in several decisions placed upon the phrase "beyond the seas," as used in statutes of limitation. In *Faw v. Roberdeau*, 3 Cranch, 174, this court, in considering the meaning of the words "out of this commonwealth," as employed in a Virginia statute of limitations, said: "Beyond sea and out of the state are analogous expressions, and are to have the same construction." In *Murray v. Baker*, 3 Wheat., 541, involving the construction of a Georgia statute of limitation, this court held that the words "beyond the seas" must be held to be

equivalent to "without the limits of the state." In *Bank of Alexandria v. Dyer*, 14 Pet., 141, the same views were expressed as to a Maryland statute of limitations. While the court in that case approved the interpretation of the words "beyond the seas," as given in previous decisions, it said that its construction was in harmony with the uniform decisions of the courts of Maryland. In *Shelby v. Guy*, 11 Pet., 366, the court was required to interpret the same words in a statute of limitation which was in force in Tennessee before its separation from North Carolina. Mr. Justice Johnson, in his opinion, remarked that it was neither sensible nor reasonable to construe these words according to their literal signification. Upon the suggestion, however, that a contrary decision had then recently been made in Tennessee, the court withheld any positive declaration upon the point, in the hope that the courts of the state would, in due time, furnish such lights upon its settled law as would enable this court to come to a satisfactory conclusion upon the question. The court at the same time decided, as they had previously done in *Green v. Neal*, 6 Pet., 291 (§§ 142-44, *supra*), and as they subsequently did in *Harpending v. The Dutch Church*, 16 Pet., 455 (§§ 57-64, *supra*), and *Leffingwell v. Warren*, 2 Black, 599, that the fixed and received construction by the state courts of local statutes of limitation furnishes rules of decision for this court, so far as such constructions and statutes do not conflict with the constitution of the United States.

§ 1013. — *review of authorities.*

Guided by the doctrines of these cases, let us inquire whether the phrase "beyond the seas," used in the statutes of North Carolina, has received a fixed construction in the courts of that state. As early as 1811, in the case of *Whitlock v. Walton*, 2 Murph., 23, 24, the supreme court of North Carolina construed the words "beyond the seas," which were used in the statute of limitations of 1715. It was there claimed that a citizen of Virginia, who had a cause of action against a citizen of North Carolina, but who failed to sue within the period fixed by the statutes, was within the saving made for the benefit of those "beyond the seas." But the supreme court of that state said: "The plaintiff is certainly not within the words of the proviso, and it does not appear to the court that he falls within the true meaning and spirit of it. Great is the intercourse between the citizens of this state and the citizens of other states, particularly adjoining states; and if suits were permitted to be brought on that account against our own citizens, at any distance of time, by citizens of other states, the mischief would be great." That case was approved in *Earle v. Dickson*, 1 Dev., 16, decided in 1826. We have been referred to no later case in that court which, in any respect, modifies these decisions. Consequently, our duty is, without reference to our former decisions, to adopt, in this case, the construction which the supreme court of North Carolina has given to the limitation statute of that state. In so doing, we pursue the precise course marked out in the case of *Green v. Neal*, *supra*, where this court said: "In the case of *Murray's Lessee v. Baker*, etc., 3 Wheat., 541, this court decided that the expressions 'beyond seas' and 'out of the state' are analogous, and are to have the same construction. But suppose the same question should be brought before this court from a state where the construction of the same words had been long settled to mean literally 'beyond seas,' would not this court conform to it?" The question was answered by saying that "an adherence by the federal courts to the exposition of the local law, as given by the courts of the state, will greatly tend to preserve harmony in the exercise of the judicial

power in the state and federal tribunals." *Supervisors v. United States*, 18 Wall., 82 (Corp., §§ 2153-57); *Suydam v. Williamson*, 24 How., 427.

It results that the absence of the complainants from the state of North Carolina, but within the United States, does not bring them within the saving made for persons "beyond the seas."

But upon this branch of the case we are met with the additional argument against the application of the statute of limitations, that this is a case of an express trust, and therefore it is not embraced by the statute. This trust is alleged to have been created by the writing which Beckham executed on the 23d of July, 1854. But we do not assent to any such construction of that writing, nor do we perceive anything in the conduct of the parties which raises a trust even by implication. As was well said by the district judge, "No trust can arise by implication from the circumstances of the transaction, as the defendants assumed no new obligation, or in any way recognized the rights of the plaintiffs to the fund derived from the sale of the land. The defendants held these funds adversely, as they formerly held the lands. They only agreed that if the plaintiffs could show, in a court of equity, that they were entitled to any relief against the defendants as the former holders of the land, the same relief should be had against them as the holders of the proceeds of the land." It is clear, from all the evidence, that no such relations were created between the parties by the transactions of 1853 and 1854, as suspended or stopped the running of the statute of limitations, and the suit seems to be barred.

But independently of the conclusion reached upon the question of limitation, there is another view which, in our opinion, equally precludes all relief to the complainants. It is not at all satisfactorily shown that F. W. Davie ever delivered as his act and deed the conveyance of January 15, 1833. The presumption is very strong that he did not. It may be inferred that the original purchase from Teague was made in deference to the wishes, or upon the suggestion, of Allen Jones Davie, whose estimate of the value of the gold under Teague's land was so extravagant that he expressed his belief of its sufficiency to pay the debt of England. The intention of F. W. Davie, perhaps, was at some future time, and when his judgment approved that course, to give his brother, who was of a restless, speculative disposition, an interest in the land. It was, doubtless, in preparation for the execution of that purpose that an original deed was prepared and signed by him, containing the terms, conditions and trusts described in the bill, and of which the paper produced is satisfactorily shown to be a correct copy. But no witness proves that he ever delivered the original to Allen Jones Davie, or to any member of his immediate family, or to Colonel Jones, the designated trustee. If the deed which C. Jones, Jr., refers to is the same original, certainly his testimony falls far short of proving that it was ever in the possession of Allen Jones Davie. That witness states nothing more than his "impression" that he saw the deed in the possession of Allen Jones Davie while the latter lived in Hillsboro', N. C. But he cannot remember its contents. Nor does he state in what year he saw it, or that he recognized the genuine signature of F. W. Davie to the deed. The original, of which the one filed is a copy, was certainly in the possession of William R. Davie, a son of Allen Jones Davie, some time after the death of F. W. Davie. But where, from whom, or when he obtained it does not appear. It is not proven that he obtained it in the life-time of F. W. Davie. It is consistent with the proof, and is not a violent presumption, that it was

found among the papers of F. W. Davie after his death. There is no competent evidence that any one ever saw it in the hands of Allen Jones Davie, or that F. W. Davie, in his life-time, in any form, recognized the right of his brother, or of the trustee, Jones, to its possession. Nor is it shown that the alleged trustee was aware, until after the death of F. W. Davie, of the trust intended to be conferred upon him when the deed should be delivered.

The loose minutes on the trial docket of the case of Allen J. Davie and others against McCulloch furnish no evidence that Allen Jones Davie, during that litigation, had any such deed, or claimed any right under it. The reasonable construction of the order made, in that case, in the year 1840, is that the suit was dismissed because he could not produce any such deed; and if he could not produce it, it must have been because F. W. Davie still had it in his possession, and had not delivered it to his brother. From 1840, down to his leaving for California, Allen Jones Davie did not seem to have any connection with the mines, and no one proves any act or assumption of ownership upon his part during that period. In view of the great value which at one time he placed upon this property, we cannot suppose, had the deed been in his custody or under his control at any time before starting on a perilous overland journey to California, that he would have left without either putting it upon record, or asserting his claim to the land in some distinct form, or protesting against the absolute sale to Beckham by F. W. Davie. More than a year before he departed for California his brother had sold and conveyed to Beckham, by deed promptly placed upon record, the identical interest in the land which the appellants claim had been in 1833 effectively conveyed to their ancestor. If, when the conveyance to Beckman was made, F. W. Davie had not delivered the signed deed of 1833, his determination in 1850 not to make such delivery, but to sell the land to Beckham, cannot be questioned by plaintiffs in error. Allen Jones Davie had not, so far as the record shows, paid anything for an interest in the land, either in money or services. The copy of the original deed which is produced recites no consideration except one dollar in hand paid; and while the record does not furnish an explanation of his change of purpose, it is clear that F. W. Davie was under no legal obligation which prevented him in 1850 from selling the land, and withholding from his brother the delivery of the deed of 1833.

So far as the record speaks it appears to be a case of an unexecuted gift by F. W. Davie to his brother. His whole conduct for many years prior to his death is altogether inconsistent with the hypothesis that he had at any time prior to his sale to Beckham consummated the gift by delivering the deed to his brother. The conclusions we have expressed are much strengthened by what occurred after the sale to the Belmont Mining Company in June, 1853. In the fall of that year C. Jones, Sr., in conjunction with William R. Davie, a son of Allen Jones Davie, employed C. Jones, Jr., an attorney and a kinsman of the latter, to establish the claim of the trustee and the children of Allen Jones Davie to the land, or to an interest in the proceeds of its sale. C. Jones, Jr., admits that he entered diligently upon the discharge of this duty. He was cognizant, because he was present at the execution of Beckham's agreement of April 28, 1854, whereby it was stipulated that the trustee and *cestui que trust* might assert, through legal proceedings, any claim they had in the proceeds of the sale of the land, and wherein Beckham agreed to appear to any suit in equity instituted for such purpose, waiving all question of jurisdiction. Although Cadwalader Jones, Sr., lived within about sixty

miles of the land for many years after the sale of June, 1853, no such proceedings were instituted until this suit was commenced in 1874, twenty-four years after the death of F. W. Davie, and twenty-one years after the sale to the Belmont Mining Company by his grantees, whose deeds were duly recorded. This great lapse of time since the sale of 1853, without an assertion, in some form of legal procedure, of the rights now claimed, is persuasive evidence that the persons who examined into the facts, when they were fresh in the minds of living witnesses, reached the conclusion that the deed of January, 1833, had never been delivered by F. W. Davie, and that therefore neither the trustee nor the children and heirs of Allen Jones Davie acquired any rights thereunder.

Upon the whole case we are satisfied that the decree dismissing the bill was right, and should be affirmed. It is so ordered.

MILLS v. SCOTT.

(9 Otto, 25-30. 1878.)

ERROR to U. S. Circuit Court, Southern District of Georgia.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This is an action at law against the administrator of the estate of George Hall, deceased, upon bills of the Merchants' and Planters' Bank of Savannah, Georgia, amounting to over \$100,000. The deceased was, on the 1st of January, 1860, and up to the time of his death, the owner of one thousand shares of the capital stock of that bank, of the nominal value of \$100 a share. A clause in the charter of the bank provided that "the persons and property of the stockholders" should be liable for the redemption of its bills and notes at any time issued, in proportion to the number of shares held by them. The plaintiff was the owner of the bills in suit, and as they were not paid on presentation he brought an action upon them against the bank in the circuit court of the United States for the southern district of Georgia, and recovered judgment, upon which execution was issued and returned unsatisfied. He then brought this action to charge the estate of the deceased, Hall, under the provision of the charter mentioned.

To the declaration the defendant pleaded the general issue and the statute of limitations of March 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before the 1st of January, 1870, or be forever barred. To the special plea the plaintiff interposed a demurrer, and it was agreed in arguing it that the following facts should be considered as set forth in the plea, namely: That George Hall was domiciled in Connecticut and died there in 1868, leaving a will; that there was no administration in Georgia on his estate until August 8, 1869, when letters of administration *ad colligendum* were granted to the defendant Mills; and that permanent letters of administration, with the will annexed, were granted to him on June 7, 1869.

The court sustained the demurrer and struck out the plea. The case was then tried upon the general issue, and the plaintiff obtained a verdict for the sum of \$100,000, of which sum \$31,354 was to be made out of the property of the deceased, then in the hands of the administrator, and the remainder out of property which might subsequently come into his hands. Upon this

verdict, judgment being entered, the defendant brought the case to this court on a writ of error.

The principal questions presented for our consideration are: 1st, whether the statute of March 16, 1869, is a bar to the action; and 2d, whether an action at law by a bill-holder to charge a stockholder will lie under the charter of the bank; and, if so, whether the declaration will sustain the finding of the jury.

§ 1014. *The Georgia statute of limitations of March 16, 1869, construed with reference to the estates of decedents.*

The statute of March 16, 1869, was intended to bring all claims to an early determination. It was passed, as recited in its preamble, on account of the confusion which had "grown out of the disturbed condition of affairs during the late war," and because of doubts entertained relative to the law of limitation of actions "which should be put to rest." It was a measure well calculated to bring disputed controversies to a speedy settlement. The time prescribed within which actions were to be brought was only nine months and fifteen days. In the case of *Terry v. Anderson*, 95 U. S., 628 (§§ 226-29, *supra*), it was held by this court that the act was not open to any constitutional objection because of the shortness of this period. The question in such cases, the court said, was whether the time allowed was, under all the circumstances, reasonable; and of this the legislature of the state was primarily the judge, and its decision would not be overruled unless a palpable error had been committed. Looking at the circumstances under which the legislature had acted, amidst the disasters which had affected the fortunes, property and business of almost every one in the state, the court could not say that the time mentioned was unreasonable. "Society demanded," observed the chief justice, "that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things;" and for that purpose, whilst the obligations of old contracts could not be impaired, "their prompt enforcement could be insisted upon or an abandonment claimed."

There is in the statute no exception in terms of any class of cases; yet such a construction must be given to its provisions as not to impair the operation of other laws, which it is not reasonable to suppose the legislature intended to repeal. The law of the state relating to the administration of the estates of deceased persons contains various provisions, which in many particulars would be defeated if the statute of March 16, 1869, was held applicable to actions in behalf of the estates or against them. Thus, administrators are allowed twelve months from the date of their qualification to ascertain the condition of the estates confided to their charge; creditors are required to present their claims within this period; and no suits to recover a debt of the decedents can be brought until its expiration. Secs. 2530, 2548 and 3348. The supreme court of the state has accordingly held that the statute of 1869 does not affect this exemption from suit for the period designated, but that its spirit and equity require that suits against administrators upon the claims mentioned should be brought within a similar period after twelve months from the grant of administration; that is, within nine months and fifteen days afterwards. Such is the purport of its decision in *Moravian Seminary v. Atwood*, 50 Ga., 382, and that decision has since been followed in several cases. *Edwards v. Ross*, 58 Ga., 147. In conformity with them we must hold that the statute was not a bar to the present action. There was no administrator of the estate of Hall appointed in Georgia, even for temporary purposes, until

April 9, 1869, and this action was commenced December 30, 1870, which was within the period required after the expiration of the year of exemption.

§ 1015. *Where by the law of a state, as held by its highest courts, an action of debt will lie for a demand otherwise of equitable cognizance, the like form of action will be permitted in a circuit court of the United States.*

Whether the present action can be maintained, it being an action at law by a bill-holder to charge the estate of a deceased stockholder, depends upon the construction given to the clause of the charter of the bank prescribing the personal liability of the stockholders. The language of the clause, so far as it bears upon this case, is that "the persons and property of the stockholders shall at all times be liable, pledged, and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess." This provision is held by the supreme court of the state to create a personal liability on the part of the stockholder for all the notes of the bank in the proportion that the shares held by him bear to all the shares of its capital stock, which any bill holder can enforce upon the insolvency of the bank by separate action to the extent of his claim. *Lane v. Morris*, 8 Ga., 468; *Dozier v. Thornton*, 19 id., 325. Such liability may undoubtedly be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one, as was held by this court in *Pollard v. Bailey*, 20 Wall., 520 (Corp., §§ 360-61). See, also, *Terry v. Tubman*, 92 U. S., 156. The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the bank, and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose. But by the law of the state, as declared by its highest tribunal, an action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases the extent of the latter's liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation.

§ 1016. *Where an error is apparent on the face of the record which cannot be corrected by an amendment of the pleadings a new trial will be ordered.*

Actions for debt will always lie where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation. Here the declaration states the number of shares of the capital stock of the bank to be twenty thousand, and that one thousand were held by the deceased. His liability, therefore, was fixed at one-twentieth of the entire indebtedness of the bank on the bills issued by it, which is averred to be \$800,000. The only recovery, therefore, which the declaration permitted was for \$40,000, and not for \$100,000, which the jury found. This error in the record is not specifically pointed out in the brief of counsel for the defendant, who was not present at the argument; but it is evident that it was at the erroneous apportionment of the indebtedness to the estate of the deceased that he aimed, when insisting that the remedy of the plaintiff should have been by a bill in equity, and not in this form of action.

Be this as it may, where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose.

This cause will therefore be remanded to the court below with directions

to grant a new trial, unless the plaintiff, within a period to be designated by the court, consent to remit from the judgment the excess over \$40,000; and it is so ordered.

HILL v. TUCKER.

(13 Howard, 458-468. 1851.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This case was brought up by writ of error from the circuit court of the United States for the eastern district of Louisiana. It was argued with the case of *Goodall v. Tucker*, 13 How., 469, but the facts being somewhat different, and the prayers to the court not exactly alike in both cases, it will be necessary to consider them separately. First, then, as to Catharine Hill's case.

She filed a petition in February, 1848, in the circuit court of the United States for the eastern district of Louisiana against Tucker, the executor of Robinson. She was the widow and sole devisee of James P. Wilkinson, who resided in Richmond, Virginia, and after his death intermarried with Hill, by whose authority she prosecuted this suit.

Robinson lived also in Richmond, although his property was chiefly situated in Louisiana. In December, 1842, Robinson died in Richmond, having made a will a few days before his death, and appointed, as executors, William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana. Johnson and Allen qualified as executors in Virginia, and Tucker in Louisiana. The causes of action in the suit brought by Catharine Hill were the four following, which will be separately noticed under the letters A, B, C, D.

[A] On the 9th of December, 1839, Archer Cheatham made a promissory note, payable ninety days after date, promising to pay to the order of Abner Robinson and Isham Puckett, \$1,000, negotiable and payable at the Bank of Virginia. It was indorsed by Robinson and Puckett, and came into the possession of Wilkinson. Not being paid at maturity, it was protested.

In March, 1840, Wilkinson brought an action against the drawers and indorsers in the circuit superior court of Henrico county, Virginia, and recovered a judgment. In July, 1840, he issued an execution, which, in August, was suspended until further orders. Cheatham and Puckett soon afterwards took the benefit of the bankrupt act passed by congress. Nothing further was done as to this claim until Catharine Hill filed her petition as above stated.

[B] On the 20th of November, 1840, Robinson gave the following due-bill:

"\$575. Richmond, November 20, 1840. Due James P. Wilkinson, for value received (namely, cash loaned), \$575. Given under my hand this day and date as above written. Abner Robinson."

In February, 1843, Wilkinson brought a suit in the Henrico county court, against Johnson and Allen, the Virginia executors of Robinson, and in the ensuing June obtained a judgment. A *f. fa.* was issued, but the return was "no effects found."

[C] On the 19th of August, 1842, Robinson made the following single bill:

"\$200. Richmond, August 19, 1842. Due James P. Wilkinson two hundred dollars for money borrowed this day, as per check on the Farmers' Bank of Virginia, of the same date, etc. Given under my hand and seal as above. Abner Robinson. (Seal.)"

In February, 1843, Wilkinson brought a suit against Johnson and Allen, upon this bill, and obtained a judgment in the following June. A *fi. fa.* was issued upon this, and the same return made as in the preceding cases, namely, "no effects found."

[D] In October, 1843, one Bolling S. Dandridge brought a suit against Robinson for \$200, being one year's wages as overseer. After Robinson's death, it was revived against his executors. In August, 1843, Dandridge obtained a judgment, and issued a *fi. fa.*; but the same return was made as above, namely, "no effects found." On the 1st of February, 1845, Dandridge assigned this judgment and execution to Wilkinson.

Not long after this Wilkinson died. The record does not show when, but in April, 1846, a succession was opened in Louisiana upon his estate, and after sundry proceedings in opposition, which it is not material to mention, his widow, Catharine, was recognized as the rightful representative of the estate. But this did not take place until May, 1847. In the meantime she had taken out letters testamentary in Virginia in August, 1846, and married Hill in December, 1846.

On the 29th of February, 1848, Catharine Hill filed her petition against Tucker in the circuit court of the United States for the eastern district of Louisiana, claiming the several sums of money mentioned in the four preceding classes.

Tucker filed his answer, alleging "that the judgments set forth were obtained in Virginia, in proceedings to which he in his capacity of executor was no party, and that they are therefore not binding on the succession of Robinson in Louisiana. That on one of the obligations, to wit, that made by Cheatham for \$1,000, dated 9th December, 1839, Robinson, if he indorsed at all, was joint indorser with one Puckett, and was in law bound only for one-half of the sum. That the actions on the demands upon which these judgments rest are barred by the prescription of five years."

The cause came up for trial before the court without a jury in November, 1849, when a judgment was given against Tucker. This was afterwards stricken out and a new trial granted. Tucker then filed a supplemental answer by way of peremptory exceptions to the petition as a plea of prescription. It stated, in substance, that as to the judgment for \$1,000 against Robinson which was rendered during his life-time, the plea of limitations was interposed; that Allen and Johnson were qualified as executors in Virginia on the 21st of December, 1842, and that more than five years elapsed between the date of such qualification and the institution of this suit; and that by the statute of limitations of the state of Virginia, the claim was barred by the expiration of five years.

In May, 1850, the cause came up for argument a second time before the court. At the trial, the causes of action designated as B, C and D were proved by evidence in Virginia taken under a commission, and records of the court as to the several judgments were given in evidence. The other facts above stated were also proved.

After the evidence was closed, the plaintiff asked the court to decide as if instructing a jury upon the evidence, as follows:

1. The testator, Robinson, resided and died in Virginia, leaving a will which was duly proven in the proper tribunal after his death, in and by which he appointed the defendant and others his executors, and two only of his executors made probate and qualified in the proper court of Virginia; and if suits

were instituted by the plaintiff and by others who have assigned their judgments and the causes of action on which their judgments were founded to the plaintiff, against the executors of Robinson who qualified in Virginia, and obtained judgments against those executors in the appropriate courts of Virginia having jurisdiction of such matters; and if upon those judgments executions issued and were returned by the proper officers in substance *nulla bona*; and if the defendant, a citizen of Louisiana, who never qualified as executor in Virginia, is a co-executor of the same estate, who has proved the will in Louisiana and taken on himself the execution thereof in Louisiana, has in his hands ample assets in Louisiana to pay all debts; and if the evidence fully establishes these facts, that then the judgments so rendered in Virginia are evidence against the executor in Louisiana in this suit.

2. That by the laws of Louisiana judgments are assignable, and that upon assigned judgments the assignee can maintain an action in his or her own name therefor.

3. That under such a will as that of Robinson, produced in this cause, the co-executors, although in different states, that qualified and acted, derived the same powers from the same source over the same estate, and that, unlike administrators, they are to such estate of the decedent privies in estate; and the exemplifications of the records of the courts of Virginia, duly authenticated, which have been read in this cause, showing judgments against the only executors of Robinson who qualified in Virginia, in the appropriate court of probate of the domicile of the deceased, are evidence against the co-executor who qualified in Louisiana, and holds abundant assets in Louisiana.

4. That if plaintiff were not entitled to recover against defendant, on the production of the records showing the judgments against the co-executors in Virginia, and that those judgments were unsatisfied because of a lack of assets in the hands of the Virginia executors to satisfy the same, that they would be entitled to recover on producing the further evidence to prove that those judgments in Virginia were rendered on good and valid, and subsisting and unsatisfied, causes of action against the testator, Robinson.

5. That the plaintiff has produced sufficient proof of the several causes of action on which the judgments read in evidence were founded to justify a jury in finding for the plaintiff upon those several original causes of action.

6. That the several causes of action set forth in the petition, independent of the judgments rendered thereon against the co-executors in Virginia, are not, upon the testimony in this cause, barred by prescription.

7. That upon all the evidence in this cause a jury might, and should, find a verdict for the plaintiff.

8. That the several suits in Virginia, of which the records have been read, operated as a judicial interpellation to stop the running of prescription upon those several demands in favor of the defendant.

And the defendant objected to said several propositions, and the court sustained his objections, and decided all and each of the several propositions against the plaintiff, except the aforesaid proposition No. 2; and to each of said decisions separately the plaintiff excepted.

And the defendant asked the court to decide:

1. That no one of the records read to the court in this cause, showing judgment against his co-executors in Virginia, was evidence against the defendant.

2. That each and every one of the causes of action set forth in the petition,

and to which evidence had been adduced, was barred as to said defendant by prescription.

3. That upon the whole evidence offered, the plaintiff was not entitled to recover; and that upon the evidence a jury could rightfully, and should, find a verdict for the defendant; to each of which plaintiff objected.

And the court overruled the several objections of plaintiff, and decided as asked by the defendant; and to each of said opinions of the court the plaintiff excepted.

§ 1017. *The relations or privity between executors and their testators in Louisiana are the same as under the common law.*

We cannot concur in the suggestion made in the argument of this case, that the relations or privity between executors and testators in Louisiana differ from such as exist at common law. Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction as is made at common law between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both as to the manner of settling the estate which they represent depend upon the law of the state; but the relation between executor and testator is altogether different. The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes,—for a part of the effects in possession of the testator at the time of his death, or for such as may be in action if it be only for a debt due.

§ 1018. *The relation which exists between executors of a decedent acting in different states.*

But though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.

All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator against any one of them in that sovereignty where he undertook to act as executor places all of them in one relation concerning it, and as to the remedies for its recovery; what one may plead to bar a recovery another may plead; and that which will not bar a recovery against any of them applies to all of them. Between administrators deriving their commissions to act from different political jurisdictions, there is no such privity. This court has treated

of this fully in two cases; in the case of *Aspden v. Nixon*, 4 How., 467 (Est. of Dec., §§ 99, 100), and in *Stacey v. Thrasher*, 6 How., 44 (Est. of Dec., §§ 70-73). We refer to the former without citing any part of it, but it is full upon the point and may be instructively read. But we shall cite a passage from *Stacey v. Thrasher*, on account of its appropriateness to what has just been said in respect to the want of privity between administrators deriving their powers in different jurisdictions.

"An administrator under grant of administration in one state stands in none of these relations—of privity—to another administrator in another state. Each is privity to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties, and over different property. The authority of each is a paramount to the other. Each is administrator to the ordinary from which he receives his commission. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts, as in the case of an administrator *de bonis non*, who may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." In that case, as a consequence of such reasoning, it was determined that an action of debt will not lie against an administrator in one of the United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state.

§ 1019. *A judgment obtained against executors acting within one state acts as a judicial interpellation as to suits on the same cause of action against executors acting within another state.*

For the same reasons, notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different state from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others were precluded by it from pleading prescription or the statute of limitations upon the original cause of action. Such is the case certainly in Louisiana, as may be seen from the case of *Jackson v. Tiernan*, in 15 Louis. Rep., 485. The supreme court of that state, speaking by Judge Martin, says that the plea of prescription cannot prevail in behalf of one joint debtor if a suit has been brought against another in the circuit court of the United States for the district of Maryland, meaning thereby, we presume, if it had been commenced in any other court in the United States. When, then, the court below rejected, as inadmissible in evidence in this case, the judgment obtained in Virginia against Allen and Johnson, the executors of Robinson in that state, we think it erred, and that it should have been admitted for the purposes mentioned.

§ 1020. *Article 3505 of the Louisiana code does not bar judgments upon negotiable paper, obtained in the life-time of a testator.*

The court also instructed the jury that the causes of action in this suit against Tucker, the co-executor of Allen and Johnson, were barred by prescription. In this we think there was error. The article of her code upon which that instruction was given, 3505, is in these words: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those of all

effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable." It is not applicable to either of the causes of action set out in the plaintiff's petition. It is not so to Cheatham's note, indorsed by Robinson, because, being carried into judgment in Robinson's life-time, it estops all his executors anywhere, from denying it, and obliges them to pay it out of his assets, wherever they may be. So it would be if, instead of executors, they were administrators, in different states, as was said in Stacey and Thrasher's case, that each administrator is privy to the testator, and would be estopped by a judgment against him.

§ 1021. *Article 3505 of the Louisiana code does not apply to or bar non-negotiable paper.*

The prescription of Louisiana, also, is not applicable to the due-bill given by Robinson to Wilkinson for \$575, or to that of \$200 for money borrowed from Wilkinson, neither of them being negotiable by the law of Virginia, or by the law of Louisiana, and therefore not within the article of prescription. For the same reason it is not applicable to the judgment obtained by Dandridge for \$200 for overseer's wages due by Robinson, and which was assigned to Wilkinson. In this view of the case, we shall direct the judgment given by the court below to be reversed, and that the case shall be remanded for further proceedings in conformity with this opinion.

HANGER v. ABBOTT.

(6 Wallace, 532-542. 1867.)

ERROR to U. S. Circuit Court, Eastern District of Arkansas.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—The declaration was in *assumpsit*, and the plaintiffs alleged that the defendant, on the 10th day of April, 1865, was indebted to them for divers goods, wares and merchandise, and also for money had and received, in the sum of \$10,000. Defendant appeared and pleaded two pleas in answer to the declaration: (1) That he never promised as the plaintiffs have alleged. (2) That the cause of action did not accrue at any time within three years next before the commencement of the suit.

Issue was joined by the plaintiffs on the first plea, and in answer to the second they filed seven replications, but particular reference need only be made to the fifth and sixth of the series. Substance of the fifth replication was that the defendant, from the 6th day of May, 1861, to the 1st day of January, 1865, was an actual resident of Arkansas, and that the plaintiffs were, at the same time, actual residents of New Hampshire, and that, during the whole of that period, they were prevented, by reason of resistance to the execution of the federal laws, and the interruption of the ordinary course of judicial proceedings, in the former state, from instituting their action, and from having the defendant served with proper process; and so they aver that they did commence their suit within three years next before the cause of action accrued.

Sixth replication alleges that the parties respectively had been, for more than three years before the commencement of the suit, actual residents of their respective states, and that the cause of action accrued before the 25th day of October, 1859, and that after the same had so accrued, to wit, on the 6th day of May, 1861, all the lawful courts of the state where the defendant resided

were closed by reason of the insurrection and rebellion which then and there arose against the lawful authority of the United States; that the courts so remained closed from that day to the 1st day of January, 1865, and so the plaintiffs say that the period during which the courts were not open, for the reasons stated, should not be deemed and taken as any part of the three years' limitation, as pleaded; and they, in fact, say that they did commence their suit within three years next before the cause of action accrued.

Demurrers were filed by the defendant to the replications, and the court gave judgment for the plaintiffs in the sum of \$9,483.26 damages and costs of suit; whereupon the defendant sued out this writ of error.

Proclamation of blockade was made by the president on the 19th day of April, 1861, and, on the 13th day of July, in the same year, congress passed a law authorizing the president to interdict all trade and intercourse between the inhabitants of the state in insurrection and the rest of the United States. 12 Stat. at Large, 1258.

§ 1022. *Effect of a state of war upon commercial intercourse with persons domiciled in enemy country.*

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. The *William Bagaley*, 5 Wall., 405; *Jecker v. Montgomery*, 18 How., 111; *Wheaton on Maritime Captures*, 209. Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation. The *Rapid*, 8 Cranch, 155; The *Hoop*, 1 Rob. Adm., 196.

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties. *Maclachlan on Shipping*, 475; *Story on Partnership*, § 316; *Griswold v. Waddington*, 15 Johns., 57; *Same Case*, 16 id., 438. Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defense. *Williamson v. Patterson*, 7 Taunt., 43. Various attempts, says Mr. Wheaton (*International Law*, by Lawrence, 551, 556), have been made to evade the operation of the rule, and to escape its penalties, but they have all been defeated by its inflexible rigor. All foreign writers on international law concur in the opinion that the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the subjects of the belligerent states. Hostilities once commenced, any attempt at trading on the part of the subjects of either state, unless by permission of the sovereign, is prohibited, and becomes *ipso facto* a breach of the allegiance due to their respective sovereigns, and as

such is forbidden by the public law of the civilized world. Bynkershoek, B. 1, ch. 3; Vattel, B. 3, ch. 4; Potts v. Bell, 8 Term, 561.

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of congress. *Exposito v. Bowden*, 4 Ellis & Blackburne, 963; Same Case, 7 id., 778.

§ 1023. *War suspends the remedies for debts between the subjects of belligerent states. Right of confiscation.*

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Kent's Com. (11th ed.), 73. Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue, or to sustain, in the language of the civilians, *a persona standi in judicio*. 1 Kent's Com. (11th ed.), 76; *Flint v. Waters*, 15 East, 260.

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party.

We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chitty on C. & M., 423. During the war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. The Hoop, 1 C. Robinson's Adm., 200; *Alcinous v. Nigreu*, 4 Ell. & Bl., 217. Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says, in effect, that the power of confiscating such debts theoretically exists, though it is seldom or never practically exerted; that the right of the creditor to sue for the recovery of the debt is not extinguished, that it is only suspended during the war, and revives in full force on the restoration of peace. Wheaton's International Law, by Lawrence, 541-877; *Furtado v. Rogers*, 3 Boss. & Pull., 191; *Ex parte Boussmaker*, 13 Ves. Jr., 71; *Signora, Edward's Adm.*, 60; *Brown v. United States*, 8 Cranch, 110; *Ware v. Hilton*, 3 Dall., 199; *Upton, Maritime W. & P.*, 42; Halleck's International Law, 358.

§ 1024. *When a debt has not been confiscated the right to sue revives on the restoration of peace.*

Under the thirty-fourth section of the judiciary act the statutes of limitations of the several states, where no special provision has been made by con-

gress, form the rule of decision in the courts of the United States, and the same effect is given to them as is given in the courts of the state. Angell on Limitations, § 24: McCluny v. Silliman, 3 Pet., 270; Bank of United States v. Daniel, 12 Pet., 32 (BILLS AND NOTES, §§ 1633-38); Porterfield v. Clark, 2 How., 125.

Grant that the law of nations is that debts due from individuals to the enemy may, by the rigorous application of the rights of war, be confiscated, still it is a right which is seldom or never exercised in modern warfare, and the rule is universally acknowledged that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated. Manning, International Law, 130; Bynkershoek, B. 1, ch. 3. Vattel says the sovereign may confiscate debts due from his subjects to the enemy, if the term of payment happens in time of war, or at least he may prohibit his subjects from paying while the war continues; but at present a regard to the advantages and safety of commerce induces a less rigorous rule. Vattel, B. 3, ch. 5, § 77.

Where a debt has not been confiscated the rule is undoubted that the right to sue revives on the restoration of peace, and Mr. Chitty says that with the return of peace we return to the creditor the right and the remedy. Unless we return the remedy with the right the pretense of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended.

§ 1025. *The object of statutes of limitation.*

When our ancestors immigrated here they brought with them the statute of 21 Jac. I., ch. 16, entitled "An act for limitation of actions, and for avoiding of suits in law," known as the statute of limitations. Proceedings in courts of justice are usually determined by the *lex fori* of the place where the suit is pending, including the statutes of limitation, which are those of the country where the suit is brought, and not those of the *lex loci contractus*. Townsend v. Jemison, 9 How., 407 (§§ 37-39, *supra*); Wheaton's International Law, by Lawrence, 187-288; Story, Conflict of Laws, § 577.

Such statutes exist in all the states, and with few exceptions they have been copied from the one brought here in colonial times. They are statutes of repose to quiet titles, to suppress fraud, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions. They proceed also upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint, because they rest on the negligence or laches of the party himself. Story, Conflict of Laws, § 576; Chitty on Contracts (10th Am. ed.), 907.

Persons within the age of twenty-one years, *femes covert*, *non compos mentis*, persons imprisoned or beyond the seas, were excepted out of the operation of the third section of the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor Kent, the opinion of jurists was in favor of the right to

confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

Constant usage and practice of belligerent nations from the earliest times subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that "free ships make free goods," which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both "the right and the remedy." *Wolf v. Oxholm*, 6 Maule & Sel., 92.

Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. 2 *Wildman's International Law*, 17. Ability to sue was the *status* of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable at the date of the contract, but which comes into operation in consequence of an event over which he has no control.

§ 1026. *Debts existing prior to the war remain entire and the remedies revive with the restoration of peace.*

Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux v. Webber*, 1 Lev., 31, there is much doubt. *Miller v. Prideaux*, 1 Keble, 157; *Lee v. Rogers*, 1 Lev., 110; *Hall v. Wybourne*, 2 Salk., 420; *Aubrey v. Fortescue*, 10 Mod., 205, are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace. 1 *Kent's Com.* (11th ed.), 169; *Grotius*, B. 3, ch. 20, §§ 16-18.

The suspension of the remedy during war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country. *Barrick v. Buba*, 32 Eng. L. Eq., 465; *Wood v. Allen*, 2 Dall., 102. But when

the reason for the suspension ceases the right to prosecute revives, and the fact that the right had been suspended constitutes no disability. *Foxcraft v. Galloway*, 2 Dall., 132; *Wall v. Robson*, 2 Nott & McC., 798; *Hopkins v. Bell*, 3 Cranch, 458; *Higginson v. Air*, 1 Desaus., 427.

When the courts of justice are open, and judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, says Lord Coke, it is said to be time of peace; but when by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war; and having described the conditions, both of war and peace, he adds emphatically, that if a man is disseized in time of peace, and the descent is cast in time of war, this shall not take away the entry of the disseizee, which is a direct authority for the plaintiffs in this case. 2 Co. Litt., 249b; Bracton, lib. 4, fol. 240; 1 Hale's P. C., 347.

§ 1027. *The operation of the statute of limitations is suspended during war.*

Text-writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations; but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of parliament, shall not be prejudicial. That, therefore, to say that the courts were shut, is a good excuse on voucher of record. Brooke, tit. Failure of Record; Blanshard on Limitations, 163; 6 Bacon's Ab., 395; 1 Plowden, 9b. Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal should be deducted, as it appeared that the injured party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of action had not accrued so as to bar it, although not commenced within six years. *Montgomery v. Hernandez*, 12 Wheat., 129 (APPEALS, §§ 1175-79). But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.

Reference is made to the remarks of the judge who gave the opinion in the case of *Alabama v. Dalton*, 9 How., 522 (§§ 13, 14, *supra*); but the case then before the court involved no such question as is presented in this case, and those remarks are more than counterbalanced by those made by the chief justice in *McIver v. Ragan*, 2 Wheat., 29, where he admits that the case would be within the exceptions to the statute, if it appeared that the courts of the country were closed so that no suits could be instituted.

Viewed in any light, we think the decision of the circuit court overruling the demurrer to the fifth and sixth replications of the plaintiffs was correct.

Plaintiffs also rely upon the act of congress of the 11th of June, 1864, as being sufficient to take the case out of the operation of the statute, but it is

not necessary to decide that point in this case, and we express no opinion upon the subject.

Judgment affirmed, with costs.

§ 1028. Absence.— Under the statute of Illinois, if a debtor is absent from the state after the cause of action accrues, the time that he is so absent is no part of the time limited for the commencement of the action, unless the debtor resides in another state or country long enough to bar the action by the laws of that state or country. *Osgood v. Artt*,* 10 Fed. R., 365.

§ 1029. Under the provision of the code of Oregon, the absence of the mortgagor does not suspend the remedy of the mortgagee of foreclosure, and does not suspend the running of the statute of limitations. *Eubanks v. Leveridge*,* 4 Saw., 274.

§ 1030. Under the provisions of the New York statute of limitations, that if, after a cause of action shall have accrued, the debtor shall depart from and reside out of the state, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action, only one case of absence is provided for, and on the return of the debtor into the state after his first departure, so as to be subject to the process of the court by the exercise of reasonable diligence and attention to his right by the creditor, the statute commences to run. *Dorr v. Swartwout*,* 1 Blatch., 179.

§ 1031. Lapse of time is a bar to an action although the debtor goes to parts unknown to the creditor, but within the United States. An action was brought in 1833 on a note payable in April, 1820, at Natchitoches. The defendant lived in New Orleans from June, 1820, to January, 1821. He then went to Mexico and remained there for two years, and since then had been in New Orleans and Kentucky and Mexico several times. Eight years before the commencement of the action he settled in Arkansas, and had been in Natchitoches twice a year since he returned from Mexico. Judgment was given in favor of defendant. *McDaniel v. Milam*,* Hemp., 274.

§ 1032. To come within the fourteenth section of the Virginia statute of limitations the complainant should show that he has been actually defeated or obstructed in bringing his action by the removal of the defendant. *Wilson v. Koontz*,* 7 Cr., 202.

§ 1033. The term "beyond seas" in the Maryland statute of limitations means without the jurisdiction of the state. The inhabitants of one of the counties forming the District of Columbia, having been incorporated into one political community, are not "beyond seas" as to those within the other. So held in an action of *assumpsit* to which the statute of limitations was set up as a defense, and the plaintiff replied setting up the exception. *Bank of Alexandria v. Dyer*,* 14 Pet., 141. *Affirming Bank of Alexandria v. Dyer*,* 5 Cr. C. C., 403. S. P., *Suckley v. Slade*,* 5 Cr. C. C., 617.

§ 1034. The phrase "beyond seas" in the statute of limitations of Georgia is equivalent to "without the limits of the state." So held in an action of ejectment to recover certain lands in Georgia. The lessors of plaintiff had not been within Georgia since the defendant's ancestor came into possession of the premises. They resided in Virginia. The statute contained an exception in favor of persons "beyond seas." *Murray's Lessee v. Baker*,* 3 Wheat., 541.

§ 1035. The plaintiff was the surviving partner of a firm. He brought suit on a note dated August 21, 1772. Andrew Johnston, one of the firm, came to this country in 1784, and died here in 1785. None of the other members of the firm had been in this country since the treaty of peace. It was held that the act of limitations of Virginia was not a bar to plaintiff's demand. (The case is more fully reported as to other facts in 3 Cr., 454.) *Hopkirk v. Bell*,* 4 Cr., 164.

§ 1036. The testator of defendant was indebted to plaintiff for a debt due in 1786. He died in 1794. The plaintiff was and continued to be a resident of Maryland from the time the contract, out of which the debt arose, was entered into until 1795, and since then has been a resident of Virginia. In 1786 plaintiff was within the state for a short time. The statute of limitations provides an exception in favor of persons "out of this commonwealth who may be plaintiffs," and allows them three years after their "disability" is removed within which to sue. It was held that the disability was removed and the statute began to run when the person comes into the commonwealth, but in order to authorize a judgment it must appear that the debtor was a resident of the state at the time the plaintiff comes in. *Faw v. Roberdeau's Executors*,* 3 Cr., 174.

§ 1037. The statutes of Wyoming Territory provide that a cause of action, barred by the laws of the state or territory in which it arose, shall be also barred in the courts of Wyoming. But if, by reason of the defendant's absence from such state or territory, during which the statute was suspended by the local law, the entire statute period has not run so as to bar the claim in such state or territory, it shall not be deemed barred in the courts of Wyoming. *Bonfield v. Price*,* 1 Wyom. T'y, 223.

§ 1038. **Death.**— The operation of the statute of limitations, if it begins to run in the life-time of a debtor, is not suspended or interrupted by his death, or the want of administration. *Hayman v. Keally*,* 3 Cr. C. C., 825.

§ 1039. **Death of assignee vests his rights in his executors or administrators, and does not prevent statute of limitations from running.** *Richards v. Maryland Ins. Co.*, 8 Cr., 84.

§ 1040. **If an executor's debt to his testator is not barred at the latter's death, the executor is bound to report it in the list of debts, and the statute of limitations ceases to run in his favor.** So held by the circuit court in Washington on an issue from the orphans' court on which a jury found that the executor was indebted to his testator at the time of his death, a petition having been filed in 1828 because of his failure to return the debt in his schedules to the orphans' court. *Wilson v. Roe*,* 3 Cr. C. C., 871.

§ 1041. **Where it becomes necessary to make a claim out of the estate of a deceased partner by reason of the insolvency of the surviving partner, it is not material that the time allowed for presenting claims against the estate of decedents has expired.** *Pendleton v. Phelps*,* 4 Day (Conn.), 476.

§ 1042. **Entry.**— A mere going upon land as a tenant will not stop the running of the statute of limitations as against the landlord; but if an older adverse claimant took actual possession, the operation of the statute might thereby be suspended. So held where one Ross, claiming title to certain land, leased, through an agent, a part to Cox, who entered, but, being threatened with a suit, abandoned the land. *McClung v. Ross*,* 5 Wheat., 116.

§ 1043. **Insolvency.**— It is not a defense to the statute of limitations that the debtor had been discharged under an insolvent law, and had subsequently, and within six years, become able to pay the claim. *Denny v. Henderson*,* 2 Cr. C. C., 121.

§ 1044. **In Louisiana prescription is interrupted by payment of interest or by suit brought.** *Cucullu v. Hernandez*, 18 Otto, 105.

§ 1045. **Judgment.**— A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the running of the statute of limitations. To do so it must be followed up by an entry sufficient to change the possession, or the tenant must attorn to the lawful owner. So held on a writ of restitution brought by a tenant, against whom a judgment in ejectment had been obtained in November, 1818, and he was evicted in November, 1829. The statute of Kentucky, where the land lay, barred the right of entry after seven years. *Lessee of Smith v. Trabue*,* 1 McL., 87.

§ 1046. **A judgment recovered against an administrator, establishing a debt against the estate of his intestate, will not operate to prevent the running of the statute of limitations against the claim as to another administrator in another state having assets of the same intestate under his control.** *McLean v. Meek*, 18 How., 16.

§ 1047. **Revival of judgment against heirs.**— The revival of a judgment against a decedent by a *scire facias* issued against the executor will not suspend the running of the statute of limitations in favor of the heir or devisee. So held where a judgment was recovered against George Deneale in 1817, and a writ of *scire facias* had been issued against his executors in 1820 and 1828, and it was sought to revive the judgment against the heirs and devisees by issuing a *scire facias* against them. *Deneale v. Stump*,* 8 Pet., 526.

§ 1048. **Effect of statute prohibiting action.**— It seems that while ordinarily, when the statute of limitations has once commenced to run, a subsequently arising disability will not stop its running, yet if the disability arises by the act of a superior power, without any default on the part of the person himself, the court will not count the period during which his right to sue is so suspended. *Braun*, on February 18, 1868, commenced an action against Sauerwein, a collector of revenue, to recover money alleged to have been illegally exacted by him on February 2, 1864. The statute prescribed a limitation of three years to the action, but by an act of congress (which took effect August 1, 1866), suits of that nature were prohibited until an appeal to the commissioner of internal revenue had been taken and a decision rendered by him, and if the decision were delayed by him more than six months, then an action might be commenced within one year from the date of the appeal. An appeal was taken August 20, 1867, and a decision rendered in January, 1868. The action was barred, as more than three years, exclusive of the prohibition, had elapsed. *Braun v. Sauerwein*,* 10 Wall., 218.

§ 1049. **By suit.**— By the articles of the civil code of Louisiana, a suit commenced against one member of a firm suspends the prescription as to the other members. So held where, in 1865, a suit was brought against a firm composed of defendant's testator and another (W. S. Key) upon two drafts indorsed by the firm and two accepted by it. The citation was served on Key only, Brown being beyond the jurisdiction of the court. No judgment was ever rendered against Key. He died during the pendency of the action, and soon after Brown died. In 1872 a supplemental petition was filed and the citation served on Brown's executor. The defendant pleaded the prescription of five years. *Ellery v. Brown*,* 2 Woods, 156.

§ 1050. **An action against an executor for an accounting will suspend the running of the**

statute on the liability of the sureties on the executor's bond in favor of both complainants and defendants. *Lockhart v. Horn*,* 3 Woods, 542.

§ 1051. To a plea of the statute of limitations, it is not a good replication that a suit for the same demand was commenced in a court of another state and discontinued within six years. The commencement of a suit to defeat the statute must be the same suit to which the statute is pleaded. *Delaplane v. Crowninshield*,* 3 Mason, 329.

§ 1052. A suit by a party who has title cannot be connected with a previous suit by a party who has no title so as to save the bar of the statute of limitations. *Henderson v. Griffin*, 5 Pet., 151.

§ 1053. By the law of Louisiana a legal interruption of a prescription takes place when, within the time limited, the possessor is called to appear even before a court not of competent jurisdiction. *Gaines v. Hennen*, 24 How., 553.

§ 1054. In an action to recover back money paid upon a judgment reversed for error, the statute begins to run from the reversal. *Bank of Washington v. Neale*,* 4 Cr. C. C., 627.

§ 1055. Under Louisiana law, prescription cannot avail where there has been an order of seizure and sale. *Gordon v. Gilfoil*, 9 Otto, 168.

§ 1056. Under the act of Maryland of 1793, chapter 30, which authorized such a proceeding, the president of the Bank of Columbia issued execution without judgment. The demand of payment, which was a necessary preliminary to the issuing of the execution, was made five days before the statute of limitations had run, but the execution could not be issued until ten days after the demand, which was five years after the expiration of the statute period. *Held*, that the issuing of the execution, and not the demand of payment, was the commencement of the suit, and that therefore the claim was barred. *Bank of Columbia v. Moore*, 3 Cr. C. C., 292.

§ 1057. An action was brought on a debt a short time before the statute of limitations had run. The petition was filed and summons duly issued and the original properly indorsed. Judgment was taken by the plaintiff by default. Two years afterwards, when the statutory period for the recovery of the original debt had elapsed, the defendant appeared, and the court, on the marshal's amended return, showing that the copy of the summons which had been left at the residence of the defendant did not contain a copy of the indorsement of the amount for which judgment would be taken if the defendant failed to appear, set aside the judgment on the ground that no service of the summons was ever made and no appearance to the action had. The court ordered, upon plaintiff's motion, that a new summons issue and the case be continued. A new summons was duly issued and served, and the defendant appeared at the next term and pleaded the statute of limitations. *Held*, that the judgment was not void, but merely irregular, and that its having been set aside did not put an end to the action; that the issuing of a new summons on the same petition as amended was not the commencement of a new action, but a continuation of the original action, and hence the defendant was not entitled to the benefit of the statute of limitations. *Isaacs v. Price*, 2 Dill., 347.

§ 1058. Where parties select arbitrators to settle an account between them, and agree that the attorney for either party may move for judgment on the award rendered, and a motion is made in court for judgment upon the award rendered, such motion, although successfully resisted, will operate as an interruption of prescription under the Louisiana code. *Martin v. Ihmson*,* 21 How., 394.

§ 1059. In bankruptcy.—Upon the filing of the petition in bankruptcy the statute of limitations ceases to run against the creditors of the bankrupt, and all claims not already barred at the time of the filing of such petition may be proved afterwards, although at the time of proof the period of the statute has expired. The effect of proceedings in bankruptcy is to vest the property of the bankrupt in the assignee in trust for the creditors; and against this trust so created the statute ceases to run. *In re Eldridge*, 2 Hughes, 256.

§ 1060. The effect of going into bankruptcy is to promise to pay all creditors *pro rata* to the extent of the assets, and to devote all assets to that purpose, in consideration of a discharge from further payment. This applies to all debts due and payable at the time and stops the statute of limitations from running against them. *Ibid*.

§ 1061. War.—The laws of 1861 and 1865 of Georgia, suspending the running of the statute of limitations, were ratified by the constitution of 1868. The act of 1869 does not control or modify their operation except as to cases in which the statute had fully run before their passage. The running of the statute was suspended from January 19, 1861, until the civil government was fully restored after the war. *Davie v. Hatcher*,* 1 Woods, 456.

§ 1062. The suspension of the running of the statute of limitations, allowed by the act of congress, ceased in Georgia on the 2d of April, 1866, the date of the president's proclamation of peace. The failure of the judge to hold a term of the district court in and to appoint a clerk for the northern district of Georgia until September 10, 1866, did not continue the suspension of the statute until that date. *United States v. Muhlenbrink*,* 1 Woods, 569. Compare *Davie v. Hatcher*,* 1 Woods, 456.

§ 1063. The statute of limitations of Kansas did not run against the right of action of a person resident within a seceded state during the continuation of the civil war. *Brown v. Hiatts*,* 15 Wall., 177, reversing *Brown v. Hiatt*,* 1 Dill., 372. Compare *Chappelle v. Olney*,* 1 Saw., 401.

§ 1064. A state of war existed between the United States and the state of Louisiana from April 19, 1861, to April 2, 1866, and the time between these dates is excluded from the calculation of the five years' prescription under the Louisiana statute. *Adger v. Alston*,* 15 Wall., 555.

§ 1065. The time during which the courts of the states in rebellion were closed to citizens of the rest of the Union is to be excluded in suits since brought, from the computation of the time fixed by the statutes of limitation within which suits may be brought, although no such exception is expressly admitted in the limitation act. *Levy v. Stewart*,* 11 Wall., 244.

§ 1066. During the period between August 18, 1861, the date of the president's proclamation declaring Arkansas to be in a state of insurrection, and April 2, 1868, the date of the proclamation declaring that the insurrection was at an end, the running of the statute of limitations (of Oregon) was suspended both in favor of and against residents within the state of Arkansas. *Chappelle v. Olney*,* 1 Saw., 401; 4 Am. L. T., U. S., 30. Compare *Brown v. Hiatts*,* 15 Wall., 177.

§ 1067. During the period between April 19, 1861, the date of the president's proclamation of blockade, and April 1, 1866, the date of the president's proclamation declaring the war ended as to South Carolina, a state of war existed between the United States and South Carolina, and during that period all legal remedies were denied between citizens of the two governments. A demurrer to the plea of limitations was therefore overruled. *Gooding v. Varn*,* Chase's Dec., 286.

§ 1068. The act of congress of June 11, 1864 (13 Stat., 123), which suspended the running of the statute of limitations, does not provide when the statute shall begin to run, and so does not conflict with the constitution of the state of Texas (art. 2), which provides that the statute should not commence to run until March 29, 1870. *Graydon v. Sweet*,* 1 Woods, 418.

§ 1069. The act of congress of 18th March, 1864, which provides that whenever, after an action, civil or criminal, shall have accrued and the defendant cannot, by reason of the war, be served with process, the time during which such person shall be beyond the reach of process shall not be deemed or taken as any part of the time limited by law for the commencement of such action, means that the time elapsed in which a suit could not be prosecuted, by reason of the war, whether before or after the passage of the act, is to be deducted. The action of the statute is not restricted to the state court. The statute is constitutional. So held in an action on a promissory note brought in 1866 by certain citizens and residents of New York against certain citizens and residents of New Orleans, which was payable in 1861 at New York. *Stewart v. Kahn*,* 11 Wall., 498.

§ 1070. The war between the states suspended the running of the statute of limitations in favor of the federal government. The act of 18th March, 1864, requires all the time to be deducted from the statutory limitations during which the suit could not be prosecuted by reason of resistance to the laws or interruption of judicial proceedings, whether such time was before or after its passage. *United States v. Wiley*,* 11 Wall., 508.

§ 1071. The statute of limitations was suspended in the insurgent states during the continuance of the rebellion. *Ross v. Jones*, 22 Wall., 586.

§ 1072. It is proper in the insurgent states to deduct the period of the war from the time prescribed by the statute of limitations for bringing actions. *Batesville Institute v. Kauffman*, 18 Wall., 151.

§ 1073. Where a party was prevented from taking an appeal to the supreme court within the time limited by the judiciary acts, on account of his residence within a state in secession, held, that the time of the duration of the war was not to be counted against him. *The Protector*, 9 Wall., 687.

§ 1074. In computing the period of adverse possession, the time during a war is rejected where one of the parties is beyond sea. *Delancey v. M'Keen*, 1 Wash., 361.

§ 1075. The fact that the civil war was raging in the south was not a sufficient ground for the suspension of legal remedies and acts of limitation as between the citizens of the Confederate States, as the courts of the Confederate States were open to all the citizens of those states, and there was no law to prohibit them from resorting thereto. Unless a country is actually occupied by hostile forces, and its laws and courts suppressed, it would be giving to the courts too large a discretion to allow them to decide when and when not the statutes of limitation are in operation as between their own citizens only. *Lockhart v. Horn*,* 1 Woods, 628.

§ 1076. As to all matters in controversy between citizens of belligerent powers the statutes of limitation are suspended during the continuance of the war; and although the general rule is that where the statute has once begun to run no subsequent disability will arrest it, a

declaration of war by the supreme power of the land *ipso facto* suspends the running of the statute. *Jackson Insurance Co. v. Stewart*, 6 Am. L. Reg. (N. S.), 732; 1 Hughes, 310.

§ 1077. The late struggle between the United States and the states attempting to secede, upon the proclamation of the president recognizing the existence of a state of war, assumed the importance and carried with it the usual legal consequences of an international war. The war suspended the right to sue as between the citizens of the two belligerent sections, and for that reason the statute of limitations was suspended also. *Ibid.*

§ 1078. It seems that the act of congress of June 11, 1864 (13 Stat., 123), by which it is enacted in substance that whenever, during the existence of the rebellion, resistance to the laws or interruption of the ordinary course of judicial proceedings prevented the prosecution of an action, the statute of limitations should not run, cannot be applied to a case arising between citizens of the same section of the country, whether of the loyal or Confederate States. *Lockhart v. Horn*,* 1 Woods, 628.

§ 1079. The time when the statute of limitations was suspended and when it began to run again in a particular state must be determined by the dates at which the war began and ended in that state; and these must be ascertained by reference to the proclamations of the president as to the various states. *Jackson Insurance Co. v. Stewart*, 6 Am. L. Reg. (N. S.), 732; 1 Hughes, 310.

§ 1080. For the purpose of ascertaining the duration of the war of the rebellion, in order to fix the time during which the statute of limitations was suspended as to contracts entered into between citizens of the two belligerent sections, reference must be had, not to the continuance or cessation of active hostilities, but to the acts of the departments of the government. Thus the proclamation of the president of the United States, issued June 13, 1865, removing the restrictions on trade with the states theretofore in a state of insurrection, was a recognition by the executive of the termination of the war, and fixed the date from which the right to sue on the above mentioned contracts revived and from which the statute began to run again. *Semmes v. City Fire Ins. Co.*, 8 Am. L. Reg. (N. S.), 673; 6 Blatch., 445; 36 Conn., 543.

§ 1081. In 1861, after Georgia had passed the ordinance of secession, its legislature passed an act suspending the statutes of limitation then in force during the then existing war. In 1865 the people of Georgia, assembled by the provisional governor, in pursuance of President Johnson's proclamation of June 17, 1865, passed an ordinance ordaining that the statutes of limitation in all cases, civil and criminal, should be suspended from the 19th of January, 1861, until the civil government should be fully restored or the legislature should otherwise direct. In 1869 the general assembly established under the new constitution passed an act declaring that all acts of the state legislature, and all ordinances of the conventions of 1865 and 1868, having the force and effect of law, which were retroactive in their character, relative to the statutes of limitation, should be held to be null and void in all cases in which the statutes had fully run before the passage of said retroactive legislation. *Held*, that the suspensory laws of 1861 and 1865, however defective they may have been in point of original authority, were ratified by the constitution of 1868; and also that the act of 1869 did not control or modify their operation, except as to cases in which the statute had fully run before their passage respectively. *Davis v. Hatcher*,* 10 Am. L. Reg. (N. S.), 519.

§ 1082. The period of the rebellion is to be excluded from the computation of the time fixed by statutes of limitation for the bringing of suits, whether arising between individuals or between an individual or individuals and the government, in all cases where either party to the claim or contract resided within the insurrectionary district. *Sierra v. United States*,* 9 Ct. Cl., 224.

§ 1083. In ascertaining the date of the close of the war of the rebellion, for the purpose of determining when the statutes of limitation began to run again, having been suspended during the war, reference must be had to the action of the departments of the government. Thus the president's proclamation of April 2, 1866, was the close of the war in the states therein mentioned, of which Florida was one. *Ibid.*

§ 1084. In determining what space of time must be considered as excepted from the operation of the statute of limitations by the war of the rebellion, it becomes necessary to refer to some public act of the political departments of the government to fix the dates of the commencement and close of the war, and for obvious reasons the proclamations of the executive department must be taken. *The Protector*, 12 Wall., 700.

§ 1085. The act of limitations of 1715, although it was unrepealed, was suspended from its usual operation by the acts disqualifying British adherents to sue in our courts. It did not begin to operate as to such persons until the end of the war, and then, if the seven years were not completed before it was repealed by the act of 1789, no bar could ever be operated under it. — *v. Lewis' Ex'rs*,* 2 Hayw. (N. C.), 346.

§ 1086. Miscellaneous.—*Semble*, that an agreement to extend the time of the payment of notes to secure which a mortgage has been given would take the mortgage out of the opera-

tion of the statute of limitations as between the original parties only, and not between the mortgagee and innocent purchasers who had no notice of such extension. *Wyman v. Russell*, 4 Biss., 312.

§ 1087. Under the fourth section of the judiciary act of 1789, although the condition of the marshal's bond is broken by his neglect to bring money into court, directed to be so brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it if not commenced within two years. *Montgomery v. Hernandez*, 12 Wheat., 129.

§ 1088. A writ of error not filed in the proper court within the time limited by law cannot defeat the operation of the statute of limitations. *Brooks v. Norris*, 11 How., 208.

§ 1089. The statute of limitations of California does not run against parties whose claims are pending in national tribunals. *Henshaw v. Bissell*, 18 Wall., 269.

§ 1090. Where in garnishment proceedings a restraining order is issued against the payment of money, such money is *in custodia legis*. Statute of limitations does not run against claimant while suit is pending. *Mattingly v. Boyd*, 20 How., 128.

§ 1091. The vesting of the title and right of action in the minor children of him against whom the statute has commenced to run does not suspend the running of the statute during the minority and consequent disability of such children. When the statute once begins to run it continues to run, and overrides all disabilities of every kind subsequently arising. *Harris v. McGovern*, * 2 Saw., 515.

§ 1092. The presentation to the department of Indian affairs of a claim arising upon a contract to cut timber on a reservation for Indian purposes will not prevent the running of the statute of limitations. The pendency of a claim in a department has no such effect. *Shimmins v. United States*, * 10 Ct. Cl., 465.

§ 1093. An insurance policy contained a clause providing that, "in case any suit shall be commenced against the underwriters after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby attempted to be enforced." The underwriters residing in Connecticut and the assured in Mississippi, *held*, that in computing the twelve months the period of the war of the rebellion must be excluded. *Semmes v. City Fire Ins. Co.*, * 8 Am. L. Reg. (N. S.), 673.

§ 1094. Parties cannot by a contract agree upon a limitation different from the statute, within which suit shall be brought or the right to sue be barred. Statutes of limitation are founded upon public policy, and contracts in conflict with such statutes are void as made against the policy of the law. *French v. Lafayette Ins. Co.*, 5 McL., 461.

XI. DISABILITIES AND EXCEPTIONS.

SUMMARY — Merchants' accounts, §§ 1095, 1096. — Assignment by one under disability, § 1097. — Joint parties, § 1098.

§ 1095. The statute of limitations of Maine excepts from its operation such accounts only as concern the trade of merchandise between merchant and merchant. A contract of charter-party, although between merchants, is not within the exception. *Spring v. Gray*, §§ 1099, 1100.

§ 1096. To come within the exception, in the statute of limitations, in favor of merchants' accounts, the account must be open. When an account is rendered by one party to the other and it is accepted, and a demand for the balance, stated in it, is made, it becomes an account stated, and the statute of limitations begins to run against it from the demand. *Toland v. Sprague*, §§ 1101-7.

§ 1097. A grantee or assignee of a person under a disability has the same time within which to commence an action that the grantor or assignor had. *Collins v. Riley*, §§ 1108-9.

§ 1098. The disabilities provided by the statute of limitations are personal, and hence where one of several coparceners is barred, the others are not, by that fact, barred. *Lewis v. Barksdale*, §§ 1110-11.

[NOTES.— See §§ 1112-1157.]

SPRING v. GRAY.

(6 Peters, 151-169. 1832.)

ERROR to U. S. Circuit Court, District of Maine.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This cause depends entirely on the question whether the plaintiffs are within the exception of the statute of limitations made in favor of “such accounts as concern the trade of merchandise between merchant and merchants.”

The plaintiffs in error brought an action on the case against the defendants in the proper court of the state of Maine, which was removed by the defendants into the circuit court of the United States for the district of Maine.

The first count was for balance of accounts annexed to the writ; the second was for money had and received. The defendants pleaded *non assumpsit* and the statute of limitations. Issue was joined on the first plea. To the second, the plaintiff replied that the accounts and promises mentioned in the declaration are and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; and issue was joined on this replication.

At the trial the plaintiffs produced the bill of lading of the outward cargo of the bark Morning Star, signed by Andrew M. Spring, the master of said bark, with the contract on the back of it, signed by William Gray, the testator of the defendants, and by Seth Spring & Sons, the plaintiffs and owners of the bark Morning Star; which bill of lading and contract are in these words:

“Shipped in good order, and well conditioned, by William Gray, of Boston, a native citizen of the United States of America, for his sole account and risk, in and upon the bark called the Morning Star, whereof is master for this present voyage Andrew M. Spring, now in the harbor of Boston, and bound for Algiers; to say [The merchandise is here described by marks, numbers and quantities]; being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of Algiers (the dangers of the seas only excepted), unto Andrew M. Spring, or to his assigns, he or they paying freight for the said goods, as per agreement indorsed hereon, without primage or average. In witness whereof the said master of the said bark hath affirmed to four bills of lading of this tenor and date, one of which being accomplished, the other three then to stand void. Dated in Boston, May 26, 1810.

ANDREW M. SPRING.”

The proceeds of the within cargo, amounting to \$35,202.83, as per invoice, costs and charges, is to be invested in Algiers or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last-mentioned charges are to be made on the goods), and returned in the said bark Morning Star to Boston, when Seth Spring and Sons (owners of said bark) are to recover one-half of the net profits thereon, in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half per cent. on the sales of the within cargo; and no commissions to be charged in Boston except what is paid an auctioneer

SETH SPRING AND SONS,
WILLIAM GRAY.

The plaintiffs also produced several letters and papers from William Gray, the master of the Morning Star, and others, respecting the outward voyage of the bark, together with the bills of lading and invoices of her inward cargo,

which was delivered to the defendants. They also produced an account from the books of Seth Spring and Sons, as follows:

WILLIAM GRAY, Esq., of Boston, Mass., in Account with SETH SPRING AND SONS.

Dr.

Cr.

1810, Sept. For loss sustained on the sloop Fanny, Captain Ebenezer Jordan, master, which said Gray insured.....	\$2,500 00	1811. By amount of the outward cargo of the bark Morning Star, as per original invoice and bill of lading.....	\$35,202 88
1811, Oct. For 35,000 gallons oil in casks delivered him from bark Morning Star, William Nason, master, at Boston, at 7s. 6d. per gal...	43,750 00	His half profits of said Morning Star's voyage.....	14,469 08
127 cases oil delivered by same, at \$10 per case...	1,270 00	1829. Balance now due from estate of said William Gray.....	34,477 45
53,803 lbs. cotton left with Mr. Lear, and afterwards paid for by the Dey of Algiers to Com. Stephen Decatur, at 30 cents per lb.....	16,140 90		
Cash paid by A. M. Spring to Bainbridge & Co., merchants, England, and by them passed to the credit of said Gray.....	2,000 00		
Paid A. M. Spring his commissions at 2½ per cent. on said bark's outward cargo, as per agreement.....	880 00		
1829. Interest on loss on sloop Fanny, 19 years.	2,850 00		
Interest on one-half the profits of Morning Star's voyage, per agreement.....	14,758 41		

When the plaintiffs had closed their evidence, the court asked whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the bark Morning Star, and the contract indorsed thereon, and they answered that they had not.

The counsel for the defendants then moved the court to instruct the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue joined on the part of the plaintiffs, in respect to their replication of merchants' accounts.

The plaintiffs' counsel objected to such instructions, and prayed the court to instruct the jury that the evidence introduced was sufficient to prove, and did prove, the issue joined on the part of the plaintiffs. The court instructed the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said last mentioned bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue last aforesaid, on the part of the plaintiffs. To this instruction an exception was taken. A verdict was found for the defendants; and this writ of error brings up the judgment which was rendered thereon.

§ 1099. *The statute of limitations of Maine excepts from its operation only accounts concerning the trade of merchandise between merchants as such.*

The statute of Maine is copied from the 20th of James I., and its words are, "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, etc., shall be commenced," etc. It would seem to be the necessary construction of these words that the actions on the case to which the exception applies must be founded on an account. The language of the act conveys the same meaning as if it had been "all actions of account, and all actions on the case, other than such as are founded on such account as concerns the trade of merchandise," etc. The foundation of the action must be an account, not a contract.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases, it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account. The account must be one "which concerns the trade of merchandise." The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise, and this trade must be not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant. This "trade of merchandise," which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account — the business of merchandise which produces it — must be between them.

§ 1100. — *a contract of charter-party between merchants is not within the exception.*

If these propositions be well founded, and we believe they are, let us apply them to the case. The defendants were undoubtedly merchants. The plaintiffs, Seth Spring and Sons, were also merchants. But they were likewise ship-owners. They were the proprietors of vessels which they hired to others for freight. A charter-party, a contract by which the owner lets his vessel to another for freight, does not change its character because the parties happen to be merchants. It is still a special contract, whereby a compensation is stipulated for a service to be performed, and not an account concerning the trade of merchandise. It is no more "an account," and no more connected with "the trade of merchandise," than a bill of exchange or a contract for the rent of a house or the hire of a carriage, or any other single transaction which might take place between individuals who happened to be merchants. An entry of it on the books of either could not change its nature, and convert it from an insulated transaction between individuals, into an account concerning the trade of merchandise between merchant and merchant. This must depend on the nature and character of the transaction, not on the book in which either party may choose to enter a memorandum or statement of it.

Had the freight contracted for been a sum in gross, or a sum dependent on the space occupied by the cargo, or on its weight, or on any estimate of its value, it would have been perceived at once to be a claim founded on contract, and not on account.

Is the nature of the transaction varied by the fact that the freight to be paid by the charterer, instead of being a specific sum, or a sum to be ascertained by some given rule, is dependent on the profits of the adventure? That the sales of the outward and inward cargo, and all the expenses attendant on the enterprise, must be examined in order to ascertain the amount of freight? This process must undoubtedly be gone through in an action on the contract, but does its necessity convert the action, which ought to be on the contract, into one founded on an account concerning the trade of merchandise between merchant and merchant? The account of the sales of the outward

cargo is to be adjusted between the shipper and his consignee, not between the shipper and the ship-owner in his adventitious character of a merchant. So the sales of the return cargo must be examined in order to ascertain whether any and how much profit has been made, and whether the ship-owner is entitled to any and how much freight. But this account is not founded on trade and merchandise between the owner and affreighter of the vessel. It is founded on the trade of the affreighter alone, to which reference must be made in order to ascertain the amount of freight. Mr. Gray could not be considered as the factor of Seth Spring and Sons, selling their goods. He was selling his own; and the relation between them was not that of merchant and factor, but of charterer and charterer of a vessel by special contract.

If we were to decide this case on the words of the statute we should not think that the plaintiffs had brought themselves within the exception. We should not consider the action as founded on "such an account as concerns the trade of merchandise between merchant and merchant."

This opinion is not changed by cases which are to be found in the books. In *Webber v. Tivil*, 2 Saund., 121, the plaintiff's declaration contained two counts, one in *indebitatus assumpsit* for money had and received by the defendant for the plaintiff's use, and for goods, wares, and merchandise sold and delivered, and the other on an *insimul computassent*. To the plea of the act of limitations the plaintiff replied that the money in the several provisions mentioned became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandise. The defendant demurred, and the whole court gave judgment in his favor.

Morton, J., was of opinion that only actions of accounts were within the exception. The report does not contain the reasons assigned by the other judges, otherwise than by stating that they were the reasons given by Mr. Jones in his argument. These were, that the statute intends to except nothing concerning merchandise between merchants, but only accounts current between them, whereas the declaration in the second count was on an account stated and agreed. He also contended that the first count did not make a case to be brought within the exception, it being only a bargain for wares sold and for money lent; and although it concerned merchandise, and was between merchants, yet there was no reason why it should be excepted out of the statute; for if it should be excepted by the same reason every contract made between merchants would also be excepted which was not the intention of the statute; for in the statute, accounts between merchants only are excepted and not contracts likewise. He also contended that actions of account only were within the exception. This point has been since overruled, though it seems to have been long considered as settled law.

This case having been decided, as the reporter informs us, for the reasons assigned by Jones, his argument must be taken as the opinion of the court. It decides that only accounts, not contracts, between merchants, even although they may concern the trade of merchandise, are within the exception, and that the accounts must be current.

In *Cotes v. Harris*, at Guildhall, Dennison, J., held that the clause in the statute of limitations, about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons. This was only the decision of a single judge; but Mr. Justice Buller seems to have given it his sanction also by introducing it into his work. *Bul. Ni. Pri.*, 150. And Lord Kenyon quoted it with approbation, in *Cranch v. Kirkman*,

Peake's Ni. Pri., 121, adding that he had furnished his note of the case to Mr. Justice Buller.

The distinction between an account current and an account stated has been often taken (1 Ves., 456; 4 Mod., 105; 2 Ves., 400; 1 Mod., 270), and is now admitted. The English cases certainly do not oppose the opinion we have formed on the words of the statute.

The American cases, as far as they go, are in favor of it. In *Mandeville v. Wilson*, 5 Cranch, 15, this court said that the exception extended to all accounts current which concerned the trade of merchandise between merchant and merchant. The only addition made in this part of the opinion to the words used in the statute is the introduction of the word "current." The statute saves "accounts current." The opinion proceeds to say that an account closed by the cessation of dealing between the parties is not an account stated, and that it is not necessary that any of the items should be within five years. This decision maintains the distinction between accounts current and accounts stated.

In *Ramchandu v. Hammond*, 2 Johns., 200, the court determined that the statute of New York, though slightly varying in its language from the English statute, was to be construed in the same manner, and "must be confined to actions on open or current accounts." "It must be a direct concern of trade; liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description."

In the case of *Coster v. Murray*, 5 Johns. Ch., 522, a purchase of goods was made by the agents of the parties, at Copenhagen, and shipped to the defendants, merchants in New York, on joint account, under an agreement made by the agents that the goods should be sold by the defendants, free from commission, and one-third of the proceeds paid to the plaintiffs, who were insurers. The goods were received and sold by the defendants, who mingled the money with their own, and refused to pay any part of it to the plaintiffs unless on terms to which the plaintiffs would not accede. To a bill filed by the plaintiffs, the defendants pleaded the act of limitations. The plaintiffs contended that the claim was within the exception of the statute in favor of accounts between merchants, and also that it related to the execution of a trust, and was therefore not within the statute.

On the first point Chancellor Kent said, "to bring a case within the exception of the statute, there must be mutual accounts, and reciprocal demands between two persons."

"In the present case there was no account current between the parties. There are no mutual and reciprocal demands."

"The defendants took charge of and agreed to be accountable for some goods, or the proceeds thereof, in which the parties had a joint interest; and as concerns the parties, and as between them, this hardly seems to be a trade of merchandise between merchant and merchant."

The chancellor took a very elaborate review of all the English cases in which this exception had been discussed. Many of them went off on other points, many were indecisive, and some of them seem to be opposed to each other, though not on the precise question which has been argued in this case.

He concluded this review by observing: "Assuming the case before me to be one that concerned the trade of merchandise between merchant and merchant, I should rather be inclined to think the statute was well pleaded, and that the case did not fall within the exception."

A decree was made in favor of the plaintiff, on the other point, from which the defendant appealed to the court of errors. The cause was argued on several points, the first of which was, "whether it came within the exception of the statute concerning the trade of merchandise between merchant and merchant, their factors or servants."

Mr. Chief Justice Spencer said the chancellor had examined the case very elaborately, and had come to the conclusion that the statute was well pleaded; and that the case does not fall within the exception. He added, "whether the statute is at all applicable to a case of mutual dealing and mutual credits between merchant and merchant is a question not now necessary to be decided, because the present is not a case of that kind. On the part of the respondents, this is no account at all. This is a case of an account merely on the part of the appellants; there is no selling or trading. It is a case of a joint purchase of goods, where one of the purchasers takes the whole goods, and is to account for one-third of the proceeds. In such a case, where the items of an account are all on one side, in my judgment it is not within the reason or principle of the exception, which must have intended open and current accounts, where there was mutual dealing and mutual credits."

Judges Platt and Woodworth concurred. There was some division in the court of errors, but the decree of the chancellor was affirmed. This case is stronger than that under consideration, and turns on principles which decide it. No doubt is expressed in it on the necessity of accounts being mutual, and being open and current, to bring them within the exception of the statute.

On a commercial question, especially on a question deeply interesting to merchants, and to merchants only, the settled law of New York is entitled to great respect elsewhere. We have found no conflicting decision in any of the states.

The account, from the books of the plaintiffs, contains one item not founded on the contract for the freight of the bark *Morning Star*, the loss on the sloop *Francis*, insured by said Gray. But this item itself is not within the exception, and was abandoned by the plaintiffs, who declared that their whole cause of action arose from the contract. The claim, to bring the case within the exception, rests entirely on the sale of the inward cargo. This single transaction has not equal (certainly not superior) pretensions to being an account current between merchant and merchant, a case of mutual accounts between them, with the sale made by the Murrys, in *Coster v. Murray*, of goods purchased on joint account, shipped to the defendants on joint account, and sold by the defendants on joint account.

We are of opinion that this action is not founded on an account concerning the trade of merchandise between merchant and merchant, their factors or servants, and is not within the exception of the statute of limitations. There is no error in the instructions given by the circuit court, and the judgment is affirmed, with costs. (a)

TOLAND v. SPRAGUE.

(12 Peters, 300-338. 1838.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the circuit court of the United States for the district of Pennsylvania. The suit was

commenced by the plaintiff in error against the defendant in error, by a process known in Pennsylvania by the name of a foreign attachment; by which, according to the laws of that state, a debtor who is not an inhabitant of the commonwealth is liable to be attached by his property found therein, to appear and answer a suit brought against him by a creditor.

It appears upon the record that the plaintiff is a citizen of Pennsylvania, and the defendant a citizen of Massachusetts, but domiciled at the time of the institution of the suit, and for many years before, without the limits of the United States, to wit, at Gibraltar; and when the attachment was levied upon his property, not being found within the district of Pennsylvania.

Upon the return of the attachment executed on certain garnishees holding property of or being indebted to the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court; after which the defendant appeared and pleaded. Issues were made up between the parties, on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial a bill of exceptions was taken by the plaintiff, stating the evidence at large, and the charge given by the court to the jury, which will hereafter be particularly noticed when we come to consider the merits of the case. But before we do so there are some preliminary questions arising in the case which it is proper for us to dispose of.

And the first is, whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him?

§ 1101. *An attachment cannot issue to compel the appearance of persons not amenable to the process of the court in personam, nor where resident abroad, nor unless the attachment is part of process to be served on defendant's person.*

The answer to this question must be found in the construction of the eleventh section of the judiciary act of 1789 (1 Stat. at Large, 78), as influenced by the true principles of interpretation, and by the course of legislation on the subject.

That section, as far as relates to this question, gives to the circuit courts original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It then provides that no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and, moreover, that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. As it respects persons who are inhabitants or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is in giving a construction to the section in relation to those who are not inhabitants and not found in the district.

This question was elaborately argued by the circuit court of Massachusetts in the case of *Picquet v. Swan*, reported in 5 Mason, 35 (COURTS, §§ 868-76). Referring to the reasoning in that case generally as having great force, we shall content ourselves with stating the substance of it in a condensed form

in which we concur. Although the process acts of 1789 (1 Stats. at Large, 93) and 1792 (Id., 275) have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of congress. The state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either persons or property, which it could not reach within the meaning of the law creating it. The judiciary act has divided the United States into judicial districts. Within these districts a circuit court is required to be holden. The circuit court of each district sits within and for that district and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district; with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor.

If such be the inference from the course of legislation, the same interpretation is alike sustained by considerations of reason and justice. Nothing can be more unjust than that a person should have his rights passed upon and finally decided by a tribunal, without some process being served upon him by which he will have notice which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan v. Rucker*, 9 East, 192. Now it is not even contended that the circuit courts could proceed to judgment against a person who was domiciled without the United States and not found within the judicial district so as to be served with process, where the party had no property within such district. We would ask what difference there is, in reason, between the cases in which he has and has not such property? In the one case, as in the other, the court renders judgment against a person who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction and upon whom they have no power to cause process to be personally served. If there be such a difference we are unable to perceive it.

In examining the two restraining clauses of the eleventh section we find that the process of *capias* is in terms limited to the district within which it is issued. Then follows the clause which declares that no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. We think that the true construction of this clause is that it did not mean to distinguish between those who are inhabitants of or found within the district, and persons domiciled abroad; so as to protect the first and leave the others not within the protection; but that, even in regard to those who were within the United States, they should not be liable to the process of the circuit courts, unless in one or the other predicament stated in the clause; and that as to all

those who are not within the United States it was not in the contemplation of congress that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; and, therefore, there was no provision whatsoever made in relation to them.

If, indeed, it be assumed that congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction, then the restriction might be construed as operating only in favor of the inhabitants of the United States, in contradistinction to those who were not inhabitants; but, upon the principle which we have stated, that congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive why the restriction in regard to the process was confined to inhabitants of the United States. Plainly, because it would not have been necessary or proper to apply the restriction to those whom the legislature did not contemplate as being within the reach of the process of the courts, either with or without restrictions.

With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of congress adopting the state process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court, *in personam*; that is, where they are inhabitants or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add, that even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as part of or together with process to be served upon his person.

§ 1102. *Where the process is invalid, but the defendant appears and pleads, the defect is cured.*

The next inquiry is whether, the process of attachment having issued improperly, there has anything been done which has cured the error? And we think that there is enough apparent on the record to produce that effect. It appears that the party appeared, and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive. The cases of *Pollard v. Dwight*, 4 Cranch, 421, and *Barry v. Foyles*, 1 Pet., 311, are decisive to show that, after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process,

and that in case of foreign attachment, too, is a personal privilege, which may be waived; and that appearing and pleading will produce that waiver.

§ 1103. *The ruling on a motion to quash the attachment in the trial court is not examinable upon writ of error in this court, not being a final judgment.*

It has, however, been contended, that although this is true as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record that a rule was obtained by him to quash the attachment, which rule was afterwards discharged; thus showing that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record what was the ground of the rule; but if it did, we could not look into it here, unless the party had placed the objection upon the record in a regular plea; upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error.

The judiciary act authorizes this court to issue writs of error to bring up a final judgment or decree in a civil action, or suit in equity, etc. The decision of the court upon a rule or motion is not of that character. This point, which is clear upon the words of the law, has been often adjudged in this court; without going further, it will be sufficient to refer to 6 Pet., 648; 9 Pet., 4. In the first of these cases the question is elaborately argued by the court, with a review of authorities; and they come to this conclusion that they consider all motions of this sort, that is, to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. That the refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act, a writ of error lies to this court only in cases of final judgments.

Having now gotten rid of these preliminary questions, we come, in the order of argument, to the merits of the case. To understand these, it will be necessary to look into the pleadings, the evidence, and charge of the court, as embodied in the exceptions.

The declaration is in *assumpsit*, and originally contained three counts, namely, the first, a court charging the delivery of certain goods to the defendant, upon a promise to account and pay over the proceeds, or sale thereof, by the defendant; and a breach of promise, in not accounting, or paying the proceeds of the sale. Secondly. A count in *indebitatus assumpsit*; and thirdly, a count upon an account stated. A rule having been granted to amend the declaration, by striking out this last count, and that rule having been made absolute, we shall consider the declaration as containing only the first two counts. To this declaration the defendant pleaded the general issue, which was joined by the plaintiff, and also the act of limitations; to this second plea, the plaintiff replied, relying on the exception in the statute in favor of such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; averring that the money in the several promises in the declaration became due and payable on trade had between the plaintiff and defendant, as merchant, and merchant and factor, and wholly concerned the trade of merchandise between the plaintiff as a merchant, and the defendant as a merchant and factor of the plaintiff; and averring, also, that no account

whatever of the said money, goods and merchandises, in the declaration mentioned, or any part thereof, was ever stated, or settled between them. The defendant rejoined that he was not the factor of the plaintiff; and that the money in the several promises in the declaration mentioned did not become due and payable in trade had between the plaintiff and defendant as merchant, and merchant and factor; and on this, issue was joined. On the trial of these issues there were sundry letters between the parties, and accounts given in evidence, which are set forth at large in a bill of exceptions, in relation to which the court gave a charge to the jury; the jury having found a verdict for the defendant, and the court having rendered a judgment in his favor, the case is brought by the plaintiffs into this court by writ of error. And the question is, whether there is any error in the charge of the court, as applied to the facts of the case stated in the exception. The court, after going at large into the facts of the case, and the principles of law applying to it, concluded with this instruction to the jury: That there was no evidence in the cause which could justify them in finding that the account in evidence was such a mutual, open one, as could bring the case within the exception of the act of limitations.

§ 1104. *To come within the exception in favor of merchants' accounts in the statute of limitations the account must be open.*

In deciding upon the correctness of this instruction, it is necessary to inquire what is the principle of law by which to test the question whether a case does or does not come within the exception of the statute in favor of accounts between merchant and merchant, their factors or servants. No principle is better settled than that, to bring a case within the exception, it must be an account; and that, an account open or current. See 2 Wms. Saund., 127, d, e, note 7. In 2 Johns., 200, the court say that the exception must be confined to actions on open or current accounts; that it must be a direct concern of trade; that liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description. But the case of *Spring v. Gray*, 6 Pet., 151 (§§ 1099, 1100, *supra*), takes so full and accurate a review of the doctrine and cases as to render it unnecessary to refer to other authorities. It distinctly asserts the principle that the account, to come within the exception, must be open or current. This construction, so well settled on authority, grows out of the very purpose for which the exception was enacted. That purpose was to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the act of limitations were to run, where their accounts were open and unsettled; where, therefore, the balance was unascertained, and where, too, the state of the accounts might be constantly fluctuating, by continuing dealings between the parties.

But when the account is stated between the parties, or when anything shall have been done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. In the language of the court of appeals of Virginia (4 Leigh, 249), "all intricacy of account, or doubt as to which side the balance may fall, is at an end;" and thus the case is neither within the letter nor the spirit of the exception. In short, when there is a settled account, that becomes the cause of action, and not the original account, although it grew out of an account between merchant and merchant, their factors or servants.

§ 1105. *Where an account is rendered to plaintiff, who accepts it and demands the balance stated in it, it is a stated account, and the statute of limitations begins to run upon it.*

Let us now inquire how far this principle applies to the facts of this case. It appears by the bill of exceptions that the facts are these:

In the year 1824 the plaintiff consigned a quantity of merchandise, by the ship William Penn, bound for Gibraltar, to a certain Charles Pettit, accompanied with instructions as to the disposition of it. Pettit, after arriving at Gibraltar, and remaining there a short time, placed all the merchandise belonging to the plaintiff, which remained unsold, in the hands of the defendant, to be disposed of by him for plaintiff's account. The plaintiff produced on the trial an account of the sales of the aforesaid merchandise, dated June 30, 1825, signed by the defendant, as having been made by him, amounting in net proceeds to \$2,579.13; and showing that balance.

In September, 1825, the plaintiff wrote to the defendant, requesting him to remit to him the net proceeds of this merchandise, amounting to \$2,579.13; after deducting therefrom a bill of exchange of \$1,000, which had been drawn by defendant in favor of Charles Pettit, on a house in New York. Pettit being indebted to the defendant, as alleged by him, in a large sum of money, for advances and otherwise, the defendant refused to pay the plaintiff the amount of the sales of the merchandise; and denied his liability to account to him therefor.

In addition to the demand before stated, by plaintiff on the defendant, for the balance of the account of sales by letter, on the trial of the cause, the counsel for the plaintiff, in opening the case, claimed the balance of an account between Sprague, the defendant, and Charles Pettit; being the precise amount of the balance of the account of sales, after deducting the bill of exchange for \$1,000. It appears that the plaintiff was in possession of the account of sales as early as September, 1825.

Upon this state of facts appearing in the record, the question is, whether the cause of action in this case is an open or current account between the plaintiff and defendant, as merchant and factor, concerning merchandise; or whether it is an ascertained balance, a liquidated sum, which, although it grew out of a trade of merchandise, is in legal effect, under the circumstances, a stated account? We think it is the latter.

In the language of the court who gave the charge, we think that "the claim is for a precise balance, which was demanded by the plaintiff from the defendant in 1825." From the nature of the account and the conduct of the parties there was from the time the account of sales was received by the plaintiff showing the balance, and demanded by the plaintiff of the defendant, no unsettled open account between them as merchant and merchant, or merchant and factor. We agree in opinion with the circuit court that there was a matter of controversy brought to a single point between them; that is, which of them had, by law, a right to a sum of money, ascertained by consent to amount to \$1,579. That the nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not ask to diminish, or the plaintiff to increase; and as neither party asks to open the account, and both admit the same balance, there can be no pretense for saying that it is still open. As the circuit court say, the question between them is not about the account, or any item in it; but as to the right of the defendant to retain the admitted balance, to repay the

advances made to Pettit. We agree with the court that the mere rendering on account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. Nor do we think it at all important that the account was not made out as between the plaintiff and defendant; the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary having claimed that balance, thereby adopted it; and by his own act treated it as a stated account. We think, therefore, that the act of limitations began to run from the year 1825, when that demand was made; and consequently that the instruction of the court was correct in saying that it was not within the exception.

§ 1106. *Where an averment is not traversed it is held to be admitted, but the rule does not apply to a negative averment not essential to the effect of the pleading.*

It has, however, been argued, that whatever might be the conclusion of the court, as resulting from the evidence, that the defendant had admitted upon the record that the account was an open one. It is said that the plaintiff having averred in his replication that there was no account stated or settled between him and the defendant, and the defendant not having traversed that averment in his rejoinder, the matter contained in that averment is admitted. It is a rule in pleading, that where in the pleading of one party there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted. We think that the rule does not apply to this case, because the negative averment in the replication, that no account had been stated between the parties, was not a necessary part of the plaintiff's replication, to bring him within the exception of the statute in relation to merchants' accounts. Inasmuch, then, as the replication without that averment would be sufficient, we do not consider it as one of those material averments, the omission to traverse which is an admission of its truth, within the rule before stated.

But in another aspect of this case the statute of limitations would apply to and bar the plaintiff's claim, if the account of sales were regarded as having no operation in the case. The plaintiff, standing in the relation which he did to the defendant, as it respects this merchandise, had a right to call upon him to account; he did make that demand, and the defendant refused to render one, holding himself liable to account to Pettit only. From the moment of that demand and refusal the statute of limitations began to run. See 1 Taunton, 572.

§ 1107. *Where there is no dispute about the facts, it is not error to instruct the jury that the account in question is a stated account.*

It was argued that the question whether there was a stated account or not was a question of fact for the jury; and that therefore the court erred in taking that question from them, and telling them that this was a stated account. The answer is that there was no dispute about the facts; and that the plaintiff claimed the balance of the account as being the precise sum due him. It was therefore competent to the court to instruct the jury that it was a stated account. Upon the whole, we think there is no error in the judgment; it is therefore affirmed, with costs.

TANEY, C. J., and JUSTICES BALDWIN and WAYNE, dissented from that part of the opinion which decides that the circuit courts have not the power to issue

the process of attachment against the property of a debtor who is not a resident of the United States; but contending that the point was not properly before the court.

COLLINS v. RILEY.

(14 Otto, 322-329. 1881.)

ERROR to U. S. District Court, District of West Virginia.

STATEMENT OF FACTS.—Riley, claiming under Abraham Wagoner and his wife, Polly Wagoner, brought suit against Collins for the land in controversy. It appeared by the special verdict that Mrs. Wagoner inherited the land from her father, who died in 1823, and in 1868 she and her husband conveyed the land to Riley. Soon afterwards Mr. Wagoner died; Mrs. Wagoner survived him but a short time. It further appeared that Mrs. Wagoner had been married to Mr. Wagoner before her father's death in 1823. There was a judgment in the district court for plaintiff.

Opinion by MR. JUSTICE HARLAN.

On behalf of Riley it is contended that the verdict is a general finding in his favor as to the undivided one-third of the several tracts claimed by the defendants respectively, and should be followed by a judgment for him, unless the facts, specially stated, preclude his recovery. In that view we are unable to concur. The finding is, in form, a special verdict as to the undivided one-third of the lands in controversy, and was so treated, in the court below, by both parties. It has all the essential requisites of a special verdict, which is one wherein the jury "state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had a cause of action, they then find for the plaintiff; if otherwise, then for the defendant." 3 Bl. Com., p. 377. The inquiry, therefore, is not whether the facts stated prevent the court from entering a judgment in favor of Riley, in pursuance of a general finding for him, but whether the facts stated—"this state of facts as to the interest of Polly Wagoner"—affirmatively established his right to any judgment against the present defendants for the recovery of that interest.

The main proposition advanced by the plaintiffs in error is that even if Riley, as between himself and his grantors, acquired that interest by an effectual conveyance, this action was barred by the statute of limitations. The statute which, it is conceded, governs this case provides:

That no person shall make an entry on, or bring an action to recover, any land but within fifteen years next after the time at which the right to make such entry, or to bring such action, shall have first accrued to himself, or to some person through whom he claims. Va. Code, 1860, tit. 45, ch. 149, sec. 1.

That if, at the time the right shall have first accrued, such person was an infant, married woman or insane, then such person, or the person claiming through him, may, notwithstanding the period of fifteen years shall have expired, make an entry on or bring an action to recover such land, within ten years next after the time at which the person to whom such right shall have first accrued shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall have happened first. Id., sec. 3.

A subsequent section makes the foregoing limitations of the right of entry

on, or action for, land subject to these provisos: that no such entry shall be made or action brought by any person who, at the time at which his right to make or bring the same shall have first accrued, shall be under any such disability, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under the same during the whole of such thirty years, or although the term of ten years from the period at which he shall have ceased to be under any such disability, or have died, shall not have expired. And, further, when any person shall be under any such disability at the time at which his right to make an entry or bring an action shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or to bring an action beyond the fifteen years next after the right of such person shall have first accrued, or the ten years next after the period of his death, shall be allowed by reason of any disability of any other person. Sec. 4.

§ 1108. *A grantee or assignee of a person under a disability has the same time within which to commence an action that the grantor or assignor had.*

Recurring to the facts stated in the special verdict it will be observed that Polly Wagoner was under the disability of coverture at the time she inherited the lands in controversy. The interest thus inherited nevertheless passed to Riley by the conveyance of January, 1868, unless *her* rights had been previously lost through adverse possession or hostile claim by others. But whether there was, prior to that conveyance, any such adverse possession or hostile claim, even as against the husband, is not distinctly found. The special verdict, it is true, states that the husband's right to recover against the defendants was barred by the statute of limitations. That, we think, is a conclusion of law rather than a statement of facts upon which it rests. If, however, we give that finding the fullest effect claimed for it,—viz., that the defendants had held continuous adverse possession of, or had asserted a hostile claim to, the lands, long enough to bar an action upon the part of the husband,—we are still not informed by the special verdict as to the time such adverse possession in fact commenced, or when such hostile claim was, in fact, first asserted by defendants. It may have existed only for fifteen years prior to the conveyance by Wagoner and wife to Riley. If it continued for that length of time the husband's right to the possession of the land would, under the statute, have been lost. But if adverse possession, or an adverse claim by defendants, for that length of time, be conceded,—and there is no reason why it should be presumed to have continued for a longer period,—it would not follow that the wife's right of entry was barred. The statute expressly declares that a woman shall not be barred of her right of entry into land, even by a judgment in her husband's life-time, by default or collusion; and, further, that "no conveyance, or other act suffered or done by the husband only, of any land which is the inheritance of the wife, shall be or make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to any one having right or title to the same by her death, but they may respectively enter into such land, according to their right and title therein, as if no such act had been done." Va. Code, 1860, ch. 133, sec. 2, p. 608.

If the special verdict had stated that defendants, and those under whom they claim, had adversely held and claimed the land for a period sufficiently long, anterior to January, 1868, to show that the wife, notwithstanding the disability of coverture, had been barred of her right of action, then the law

would be with the defendants. But no such facts are found. The verdict is, as we have seen, wholly silent as to when their adverse possession or claim commenced; and the court is asked to adjudge, as matter of law, that she was barred simply because, at the date of the conveyance to Riley, her husband's right to recover was cut off by limitation. By the express words of the statute she had ten years after the disability of coverture was removed in which to assert her right of entry, provided thirty years from the date when her right first accrued had not expired. Notwithstanding, therefore, her husband's right of possession may have been barred when the deed to Riley was made, that conveyance, in the absence of evidence that she was barred, must be held to have passed whatever interest she then had in the lands.

Further, if it be conceded, as perhaps it must be, that the husband and wife — the former being barred — could not have brought a joint action to recover the lands, and that during the life of the husband Riley could not have asserted his rights, as against the defendants, it would not follow that he got nothing by the conveyance. He certainly did acquire the wife's interest; and, when her disability was removed, he could enter upon the land, or bring an action for its recovery, precisely as she could have done, upon the death of the husband, had she not joined in the conveyance. This is clear from a comparison of the limitation act of Virginia, passed February 25, 1819, with the provision of the code of 1860. The former, while prescribing twenty years as the time within which an action for the recovery of land must be brought, gave to infants, *femes covert*, and others under disability, and to their heirs, ten years after such disability was removed, in which to sue, notwithstanding twenty years may have passed after the right to sue accrued. Va. Rev. Code, 1819, vol. i., p. 488. On the other hand, the code of 1860, as we have seen, saved the rights of those who claimed through the person to whom the right of entry or action accrued. Riley, undoubtedly, claimed through the wife, and could sue by virtue of his ownership of her interest, because she could have sued had no conveyance been made.

§ 1109. *A court on appeal cannot pass on facts, and the burden of proof that an action is barred lies on the party pleading that defense.*

But it is argued that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record. It is not necessary, in the view we take of this case, to controvert any of these propositions. They undoubtedly embody a correct statement, as far as it goes, of the law in reference to special verdicts. But we do not perceive that their application in this case would lead to any result different from the one already indicated. We have taken the special verdict as presenting the whole case as to Polly Wagoner's interest in the lands. It shows that Swetzer, under whom both sides claim, was, at his death, the owner of the land; that upon his death an undivided third thereof was inherited by his daughter Polly; and that her interest was conveyed, in 1868, to Riley, by the joint deed of herself and husband. No fact is stated justifying the conclusion that her interest in the land had been lost, prior to the conveyance, either by adverse possession or by adverse claim. If such fact existed it was the duty of the defendants, who relied upon limitation, to have established it by proof, and caused it to be

stated in the special verdict. The record contains no bill of exceptions, and were we at liberty to look beyond the special verdict, we should find in the record no evidence whatever upon that point. We cannot presume that any such evidence was offered. It was not for Riley to prove that Mrs. Wagoner's right had not been lost by adverse possession or adverse claim by others. That was matter of defense. Counsel for the plaintiffs in error have proceeded, in their argument, upon the assumption that the special verdict sets forth facts showing that her right was barred, at the time of the conveyance to Riley, or at the commencement of the action. But evidently it shows nothing more than that the husband was barred as to *his* right of possession.

Another proposition advanced by counsel for plaintiffs in error deserves notice. It is, that the special verdict does not show that they were, at the institution of the suit, in possession of or claimed title to the interest of Polly Wagoner in the lands in dispute.

By the code of Virginia of 1860 it is declared that "if the jury be of opinion [in actions of ejectment] for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof, or claimed title thereto, at the commencement of the action" (p. 612). There was a similar provision in the code of 1849, p. 561. The verdict in this case is in substantial conformity with this statutory requirement. The issue to be tried was whether the defendants unlawfully withheld from the plaintiff the premises described in the declaration. The verdict finds for the defendants as to the undivided two-thirds of the land in dispute. If that be not, in legal effect, a finding that defendants were in possession of the entire land, there is a finding that defendants, respectively, claimed title to the several tracts in controversy. The verdict describes by metes and bounds each tract embraced in the suit, giving the name of each defendant by whom it is claimed, and finding for defendants as to two-thirds, undivided, of the respective tracts. It then proceeds to find as "to the remaining one-third of the lands hereinbefore excepted and claimed by said defendants." Although the verdict does not state, in terms, that the defendants were in possession, it does state that they claimed the lands in dispute. And that seems to be sufficient under the local law. In reference to the case of *Southgate v. Walker*, 2 W. Va., 427, it is sufficient to say that it related to an action of ejectment commenced in 1848, before the adoption of the above-recited provision. We are referred to no decision of the state court in conflict with the construction we have given to that provision.

We deem it unnecessary to comment upon any other objections urged against the special verdict. There is no error in the judgment, and it is affirmed.

LEWIS v. BARKSDALE.

(Circuit Court for Virginia: 2 Marshall, 436-446. 1831.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is an ejectment brought by seven coparceners to obtain possession of a tract of land of which their ancestor died seized. The original title of the lessors of the plaintiff is not controverted. The defendant resists the claim under an adversary possession of more than twenty years.

Mary Lewis died, seized in fee of the premises, in the year 1797, intestate,

leaving seven children, the lessors of the plaintiff, her heirs at law. The premises remained in the possession of her husband as tenant by the curtesy, until his death, which happened previous to the year 1801. Matthew Henderson was appointed guardian to four of the heirs, and in the year 1806 Micajah Clarke was appointed guardian to two others of them. In the year 1806 Matthew Henderson sold the land to the defendant, who took possession thereof on the 25th of December, 1806, and has held quiet possession until the institution of this suit, claiming to hold the premises as his own property in fee-simple under the said sale. No deed of conveyance was exhibited, but a bond in which the said Henderson and Clarke bound themselves with a surety to make a good title, was relied on by the defendant.

On the 25th of December, 1806, six of the infant heirs, for whom guardians had been appointed, were in the state of Kentucky, where they remained until the institution of this suit. Mary Lewis, now Mary Russell, one of the lessors of the plaintiff, who was also an infant, was at that time in Virginia, but removed to the state of Kentucky some time in the year 1807.

The plaintiffs, each of them, attained their age of twenty-one years more than ten years before the institution of this suit. A joint demise, and also several demises from each of the heirs, are laid in the declaration.

§ 1110. *One disability under the statute of limitations cannot be tacked to another. The period of limitation begins to run at the expiration of the first disability.*

Had the lessors of the plaintiff been seized in severalty of the same property, and been placed under precisely the same circumstances in every other respect, no doubt could exist in the case. On the 25th of December, 1806, when the cause of action accrued, Mary Lewis, now Mary Russell, was an infant, residing within the commonwealth of Virginia, and came within that exception of the statute only, which saves the rights of infants. Pending this disability, she removed out of the country, and has continued out of it until the institution of this suit. But it is admitted that one disability cannot be tacked to another, and, consequently, the right of this party is the same as if she had remained within the state. The statute preserves her right of action for ten years after she has attained her age of twenty-one years. That time having expired, she would be no longer within its saving.

§ 1111. *The disabilities provided for by the statute of limitations are personal. Hence, where several coparceners claim by virtue of disabilities, none will be bound by the laches of his fellow coparceners.*

The other six plaintiffs were out of the commonwealth when the cause of action accrued, and have continued out of it until the institution of this suit. Consequently they are not barred by the act. If, then, the plaintiffs claimed in severalty, it would be clear that six of them would be entitled to recover, and that the defendant would retain the seventh part of Mary Russell.

If this were an original question, I should feel much difficulty in so construing the first and second sections of our act of limitations as to exclude one co-heir from the exception in his favor, in consequence of the omission of another to assert his right within the time to which it is limited. The proviso of the act appears to me to be in favor of each individual who comes within it. It is personal. It applies to him who labors under the disability. It is made in consequence of that disability; and, it seems to me, that the intention of the act would be defeated by a construction which denies the benefit of the

saving to an individual coming within its words, or would give that benefit to an individual not coming within them.

Both the plaintiffs and defendant, however, insist that this rule does not apply to the case at bar.

The counsel for the plaintiffs contends that the guardians of those infants to whom guardians had been assigned had a right to lease the lands during the infancy of their wards; that Barksdale must be considered as coming into possession under the title which the guardians had a right to make, and as being tenant in common with Mary, the coparcener, who had no guardian, and whose right the guardians of the other infants could not pass, and that an adversary possession against Mary cannot be presumed.

The law respecting the possession of one coparcener, or tenant in common, as against co-tenants, is certainly as it has been laid down. But Mr. Barksdale did not enter under a lease, nor did he, so far as we are informed by the verdict, acquire the possession under Henderson and Clarke, as guardians. He purchased from them an absolute title in fee-simple, entered on the premises in virtue of that title, and held the same as his property. It is admitted that this is evidence on which the jury might have found an adversary possession, and on which the court might have instructed the jury so to find; but, as the jury has not found the adversary possession, the court, it is said, cannot presume it. But the jury have not found the tenancy in common, and Mr. Barksdale certainly did not enter as a tenant in common. The argument, too, is founded on the idea that adversary possession was a technical phrase, which it was necessary to find in terms. The act does not use the term, and I am not satisfied that such is the law. Equivalent terms may bring the possession within the act; and this verdict does find a possession, which must be adversary. It finds that the vendee took possession under the sale, and has continued in possession ever since, claiming the land as his own property. The verdict does not inform us that Henderson and Clarke acted in the character of guardians, and the sale was certainly one which, as guardians, they could not make rightfully. I do not then consider the general law, which is applicable between coparceners, or tenants in common, as applying in this case.

The counsel for the defendant contends that the lessors of the plaintiff constitute but one heir, and that as one of them is barred by the act of limitations, all are barred. As one of them cannot be brought within the savings of the act, those who do come within it cannot avail themselves of the exception in their favor.

It has already been said that this construction would defeat the obvious intention of the act. A person whose right is expressly saved for his own benefit would be deprived of that right by the negligence of another, over whom he had no control. One of the coparceners might have been of full age when the cause of action accrued, so that as to him the time would run from the entry of the defendant. The exception, then, in favor of the parties in whose favor the exceptions are made would be of no avail. According to the principles maintained by the defendant, as they are understood, no partition could be made by the coparceners while out of possession. Their deeds are mere nullities, under the act prohibiting conveyances of pretended titles. This construction would certainly defeat the intention of the law. If it could be sustained, the separate demises laid in the ejectment would be erroneous, for one joint demise only could be sustained. But, although the title be joint,

the interest is, to every intent and purpose, several, and does not survive. In reason, then, it would seem that each coparcener might recover his separate interest. The case of *Roe dem. Langdon v. Rowston*, 2 Taunt., 440, is the very case, and must be declared not to be law, on the principles for which the defendant contends.

The cases cited from 4 Term Rep. (*Perry v. Jackson*, 4 Durn. & E., 516), and 7 Cranch (*Marsteller v. M'Clellan*, 7 Cranch, 156), are not applicable to this. They were decided, not upon the rights of the parties, but the form of the pleading. The parties pleaded jointly, and their plea was good or bad in the whole. The court must either have determined that a party not within the exception was brought within it by being joined with a person entitled to its benefits, or that a person really within it must lose its benefit by having joined in the plea with a person not entitled to the protection of the bar. The plea was not good as to the person who could not bring himself within the exception, and being bad in part, was, on technical legal principles, declared to be bad in the whole. But this technical rule does not apply to this case. The lessors of the plaintiff claim distinct rights under separate demises. Nothing in the form of the pleading restrains the court from deciding according to the rights of the parties. The judgment, then, should be according to the legal rights of the parties; that the plaintiff recover six-sevenths of the land in the declaration mentioned, and that judgment as to the other seventh be entered for the defendant.

§ 1112. When statute of limitations begins to run.—An action of debt on a bond, dated in 1773, was brought by defendant in error. The obligees were British subjects. The defense consisted of the lapse of time sufficient to raise a presumption of payment. It was held that twenty years, exclusive of the period during which a disability existed, must elapse to raise the presumption. *Dunlop v. Ball*, * 2 Cr., 180.

§ 1113. Under the statute of limitations one laboring under two disabilities is not bound to sue until both are removed. *Sims v. Everhardt*, 12 Otto, 300.

§ 1114. The California statute of limitations does not begin to run against a person under disability until the disability is removed. The grantee of such person, after the disability is removed, has the right that his grantor had. *Le Roy v. Reeves*, 5 Saw., 102.

§ 1115. How benefit of exception taken.—A party who would relieve himself from the enacting clause of a statute of limitations by any proviso must bring his case strictly within the exceptions. Thus where an action of *formedon in descender* was brought, in which the demandant founded upon a devise in 1741, and a descent cast in 1808, to which the plea was that the tenants had held for twenty years and more preceding the 28th April, 1785, and from that time down to the date of the writ, and the demandant replied he had brought his suit within ten years after the descent cast, and to the replication there was a demurrer, it was held that the action of *formedon* was not within the letter of the exception of the statute, and the replication was adjudged bad. *Inman v. Barnes*, * 2 Gall., 814.

§ 1116. Accounts between merchants.—The exception contained in the Maryland statute of limitations in favor of such accounts as concern the trade of merchandise between merchant and merchant who are not residents within the province applies to accounts between merchants where one of them resides out of the state; and in order to cause the statute to commence running, the non-resident must have become a resident, in which case the action would have been barred after three years. So held in an action on such an account where the plaintiff resided in Pennsylvania and defendant in Maryland. *Bond v. Jay*, * 7 Cr., 350.

§ 1117. The exception in the Virginia statute of limitations in favor of accounts between merchants applies to the action of *assumpsit* as well as to actions of account. An account closed by the cessation of dealings between the parties is not an account stated, and is within the exception. So held in an action of *assumpsit* on an account arising from the trade of merchandise, both parties having been merchants, and the firm of defendants having been dissolved in 1799, at which time all accounts between the parties ceased. *Mandeville v. Wilson*, * 5 Cr., 15; affirming *S. C.*, * 1 Cr. C. C., 452.

§ 1118. Where the parties to an action each claim a balance on an unliquidated account, and the defendant pleads the statute of limitation, the plea is bad. *Ellis v. Jarvis*, 8 Mason, 437.

§ 1119. Pennsylvania statute of limitations on accounts does not apply to stated accounts; not to accounts of partners *inter sese*. *Bispham v. Price*, 15 How., 162.

§ 1120. Administration.—An action to recover lands sold by an administrator in California must be brought within three years after the sale. The pendency of administration is not a "legal disability" preventing the running of the statute of limitations in favor of the purchaser under a void sale by the administrator. So held in an action brought in 1874, by the assignee of the heirs, against a purchaser from an administrator in 1856. The sale had been declared void, and real property was, by statute, assets in the hands of an administrator, and he was entitled to the same. The statute contained an exception in favor of "minors and others under any other legal disability." *Meeks v. Vassault*, * 8 Saw., 206. Affirmed, *Same v. Olpherts*, 10 Otto, 564 (§ 624).

§ 1121. Cumulative disabilities—New York.—Under the statute of limitations of New York, successive or cumulative disabilities are not allowed either in ejectment or upon writ of right. In an action brought to recover certain lands in New York, the plaintiff claimed as heir of Hannah Turner, wife of Edmund Turner, who was insane for several years before 1805 and until her death in 1822. Her heir, the mother of plaintiff, was married to Peter Thorp while a minor. Peter Thorp died in 1832, and his wife in 1842. The defendant was the tenant of one Lydigs, who had been in adverse possession since 1804, claiming to be owner in fee. It was held that the heirs of Hannah Turner had ten years after her death, when her disabilities ceased, in which to bring their action; that any disability they might then be under would not affect the running of the statute. *Thorp v. Raymond*, * 16 How., 247.

§ 1122. Cumulative disabilities are not allowed. A person may only avail himself of such disabilities as exist when the cause of action accrues. When once the statute of limitations has begun to run, it runs over all subsequent disabilities without being affected thereby. So held in an action in equity to recover certain lands in Rhode Island which had been in the possession of defendants adverse to plaintiff and those under whom she claimed for over eighty years. The complainant, to offset this, relied on the coverture of her mother and grandmother, and her own absence from the state. *Moore v. Green*, * 2 Curt., 202. Affirmed, 19 How., 69.

§ 1123. Cumulated disabilities not admissible. *Bedilian v. Seaton*, 8 Wall. Jr., 287.

§ 1124. Under the Virginia statute of limitations, cumulative disabilities are not allowed. Suit in equity to recover certain lands in Virginia commenced in 1819. The cause of action, if any, accrued in 1787. The plaintiffs claimed as lessees of the heirs of Jane B. Swann, who had married Thomas Swann in 1794, when within a few months of her majority. She died in 1812. It was held that the disability of coverture could not be added to that of infancy in Mrs. Swann. *Mercer v. Selden*, 1 How., 37.

§ 1125. Daniel Clark died leaving two wills, one dated in 1811 and the other in 1813. Under the latter the plaintiff was universal legatee. The executors under the will of 1811, acting as such, authorized Hammond to sell certain real property in Missouri. This Hammond did, but he converted the proceeds to his own use. In 1823 the executors obtained judgment against Hammond and bought certain land alleged to be his under execution, but did not take title. In fact Hammond had no title to it; but in 1864 the title was confirmed to him by act of congress. He was then dead, and letters were not taken out on his estate until 1879. The will of Clark dated in 1811 was, after a long contest, declared void in favor of that of 1813. This bill was filed to subject the land to the payment of Hammond's debt to the Clark estate, which accrued in 1819. It was held that the plaintiff could not tack her subsequent disabilities by successive covertures to prevent the operation of the statute, and that the issuing of letters of administration on Hammond's estate and the fact that the Clark will could not be established was no defense to the statute, as Hammond was not a party to the contest. *Gaines v. Hammond*, * 2 McC., 432. Affirmed, 111 U. S., 395.

§ 1126. A disability arising after the accruing of a cause of action cannot be tacked to another existing at that time so as to interfere with the running of the statute of limitations. Therefore, in an action of ejectment brought by seven coparceners to obtain possession of a tract of land in Virginia, of which their ancestor died seized in 1797, and on December 25, 1806, the guardians of four of them sold the land in fee to defendant, who held quiet possession down to the institution of the suit, and one of the heirs was then an infant resident in Virginia, and subsequently, in 1807, moved to Kentucky, it was held that she was barred by the statute. *Lewis v. Barksdale*, 2 Marsh., 436 (§§ 1110-11).

§ 1127. Subsequent disability.—When the cause of action accrues, and the statute of limitations commences to run, its operation will not be suspended by any subsequently arising disability. In an action to recover possession of a city lot in San Francisco, the plaintiffs claimed as heirs and devisees of Stephen Harris, to whom a grant of the lot had been made in 1848, under the name of Stephen A. Harris. Two years later Harris left California, and on the 5th of November, 1867, he died. There was in the city another man by the name of Stephen

A. Harris, under whom defendants claimed by deed dated 1st May, 1854. It was held that the statute commenced to run during the life of Stephen Harris, and was not interrupted by his death and the devise to plaintiffs, though minors at the time. *Harris v. McGovern*, 9 Otto, 161 (§§ 840-46).

§ 1128. When the statute of limitations once begins to run, it continues to run over all intervening disabilities. Action of ejectment to recover certain lands in New Jersey, of which Joseph Bell owned three-eighths at his death in 1821. He left as heirs an uncle and aunt, and numerous cousins. Soon after his death his co-tenant bought the interest of the uncle and aunt, supposing them to be his sole heirs, and the share of the third co-tenant. One of Bell's cousins was, at his death, a widow. She subsequently died, leaving several daughters who were married, and other heirs left their interests to married daughters. It was held that as the statute commenced to run against these cousins before their deaths, it continued to run, although their heirs were married women. *Roberts v. Moore*,* 3 Wall. Jr., 292.

§ 1129. After the statute of limitations has once commenced to run, a subsequent accruing disability does not stop it. So held in an action of ejectment to recover certain lands in Kentucky. *Walden v. Heirs of Gratz*,* 1 Wheat., 292.

§ 1130. The act of limitations of New Jersey, limiting the right of entry on lands to twenty years, provides that in case of certain disabilities the time during which the person who shall have the right of entry shall be under any such disability shall not be taken or computed as part of said period of twenty years. Held, that when the statute has once begun to run it will continue to run over all subsequent disabilities. *Roberts v. Moore*,* 9 Am. L. Reg., 25.

§ 1131. The courts will not make exceptions to the statute of limitations.—When the legislature makes no exception to the statute of limitations the court cannot make any. So held where an action was commenced in 1846 in Mississippi, on a judgment rendered in a state court in Alabama, to which the defendant pleaded the statute of 1844, which barred actions on judgments obtained out of the state before the act was passed unless suit was brought on them within two years after the date of the act. Plaintiff replied that at the time of the rendition of the judgments, and until the action was commenced, the defendant was a citizen of Alabama. *Bank of State of Alabama v. Dalton*, 9 How., 522 (§§ 18, 14).

§ 1132. The same principle was declared on the following facts: M'Iver and others brought an action to recover certain lands in Tennessee. They claimed under a grant from the state of North Carolina of a larger tract. The defendants claimed under a junior patent to Mabane, a possession of seven years by Ragan, which, under the statutes, would raise a bar. To repel this, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked except the beginning corner; that all the corners except one were within the Indian Territory, which was not ceded to the United States until 1806, within seven years before the commencement of the action. The land in possession of Ragan did not lie within said territory. The laws of the United States prohibited all persons from surveying or marking any lands within Indian territory. It was held that the court could not make an exception. *M'Iver v. Ragan*,* 2 Wheat., 25.

§ 1133. The court cannot engraft on a statute of limitations an exception that the act itself does not make. *United States v. Maillard*, 4 Ben., 465.

§ 1134. The courts cannot engraft exceptions on the statute of limitations. Thus, where White was indicted for a crime committed more than two years before the finding of the indictment, but had been a person "fleeing from justice" within the meaning of the statute, which suspended its running, and he might, at various periods within the statutory limitation of two years, have been arrested in the United States, it was held that the latter fact did not cause the statute to run. *United States v. White*,* 5 Cr. C. C., 116.

§ 1135. The same principle was held where an officer of an American vessel was indicted in 1873 for beating and wounding a seaman on the high seas. When the offense was committed the vessel was engaged in a whaling voyage, and did not return to the United States until more than two years afterwards. The statute provided a general limitation of two years to all crimes, and did not contain an exception covering the particular case. The indictment was set aside. *United States v. Brown*,* 2 Low., 267.

§ 1136. Though the court may think the legislature would have excepted a case out of a statute of limitations if it had been foreseen, the court cannot except it. *The Sam Slick*, 2 Curt., 480.

§ 1136a. No person competent to sue.—If, when the right of action would otherwise accrue and the statute of limitations begin to run, there is no person in existence who is qualified to sue upon that right, the statute does not begin to run until there is such person. Thus where suit was brought against the United States by the representatives of a mail contractor for services performed under his contract after the death of such contractor, it was held that as no one could bring suit upon the claim but an administrator, the statute did not begin to run until one was appointed, and that he was entitled to bring his action within six years from the

time of his appointment, which might indeed be more than six years after the claim accrued, notwithstanding the fact that the disqualification of the representatives to sue without an administrator is not mentioned in the statute, and the provision of the statute that "no other disability than those enumerated shall prevent any claim from being barred." *Fulenweider v. United States*,* 9 Ct. Cl., 403.

§ 1137. *Infants and femes covert*.—In action of trespass *quare clausum fregit* the statute of limitations was pleaded. The replication then alleged the infancy of some and coverture of others of the plaintiffs. *Held*, that the disability of some of the plaintiffs did not take the case out of the statute of limitations. *Marsteller v. McClean*,* 1 Cr. C. C., 579.

§ 1138. By the Oregon statute of limitations (Code of 1854, p. 172; Code of 1876, p. 108), where a cause of action to recover real property accrues to a married woman, the time of her disability or marriage shall not be counted as a part of the limitation; and this is true whether the cause of action relates to her separate property or otherwise. *Wythe v. Smith*, 4 Saw., 17.

§ 1139. If the statute of limitations runs against one of several parties entitled to a joint action, it operates as a bar to such action. Thus, where a declaration in *assumpsit* contained an averment that certain of the plaintiffs, at the time when the cause of action accrued, "were *femes covert* and ever since have continued *femes covert*," and another of the plaintiffs "was a *feme covert*," it was held, on demurrer, that the averment as to the latter plaintiff would have been fatal in a several action brought by her, and that when the statute has run against one of two parties entitled to a joint action, it operates as a bar to such joint action. The demurrer was sustained. *Marsteller v. McClean*,* 7 Cr., 156.

§ 1140. By the construction of the act of Kentucky of 1797, granting further time for making surveys, with a proviso allowing to infants, etc., three years after their several disabilities are removed to complete surveys on their entries, if any one or more of the joint owners be under the disability of infancy, etc., it brings the entry within the saving of the proviso, as to all of the other owners. *Miller's Heirs v. M'Intire*, 11 Wheat., 441.

§ 1141. The act of Kentucky of 1797, taken in connection with preceding acts, declaring that entries for land shall become void, if not surveyed before the 1st day of October, 1798, with a proviso allowing to infants and *femes covert* three years after their several disabilities are removed to complete the surveys on their entries, it was held that if any one or more of the joint owners be under the disability of infancy or coverture it brings the entry within the saving of the proviso as to all the other owners. *Shipp v. Miller*, 2 Wheat., 816. See *Lewis v. Marshall*,* 1 McL., 16.

§ 1142. A claim is not stale when the party was under the disability of coverture until three years before bringing suit. *House v. Mullen*, 22 Wall., 42.

§ 1143. The statute of limitations does not run against a *feme covert* in Oregon. *Wythe v. Smith*, 4 Saw., 17.

§ 1144. Neither lapse of time nor the statute operates against infants, and yet if the statute begins to run in the life of the ancestor, it will continue to run after his decease against his minor heirs. *Bowman v. Wathen*, 2 McL., 401.

§ 1145. *Non-residents*.—The statute of limitations of Ohio bars the heirs of a non-resident by an adverse possession of twenty years, during the life of the ancestor. *Lewis v. Baird*, 3 McL., 56.

§ 1146. Non-residence saves the operation of the statute of limitations, but not the effect of time. *Bowman v. Wathen*, 2 McL., 400.

§ 1147. Statute of limitations does not run against non-residents. *Kibbe v. Thompson*, 5 Biss., 232.

§ 1148. It is a good replication to a plea of the statute of limitations that the plaintiff is and has been a foreigner and beyond seas. *Chomqua v. Mason*, 1 Gall., 342.

§ 1149. Defendant owned a large and valuable farm, with stock upon it, in B., in the state of Vermont. The farm was formerly owned and occupied by the defendant's father, who afterwards conveyed it to the defendant, subject to a life estate in the father, by deed duly executed and recorded. After the father's death the defendant leased the farm with the stock upon it, to tenants who occupied it under him. Both farm and stock, during the whole time, having been set in the list for the purpose of taxation, in the name of the defendant with the name of the occupant, and were generally known in the town, which was a town of note and the seat of justice for the county, as the property of the defendant. B., where the property was situate, was the dwelling-place of the family while living, to which the defendant belonged, and where he might, if anywhere, claim to have his domicile, though personally absent therefrom except an occasional return during his long service in the army. The statute of limitations in the state of Vermont runs in favor of the party although he be absent from and resides out of the state, if he have known property within the state, which could, by the common and ordinary process of law, be attached. *Held*, that these circumstances were sufficient to charge the plaintiff with knowledge of the existence of attachable property of defendant in the

state, and cause the statute to run in favor of the latter. *Stoughton v. Dimick*, 3 Blatch., 856; 8 Law Rep. (N. S.), 557; 29 Vt., 585.

§ 1150. The state of Delaware is "beyond seas" in regard to the District of Columbia, within the meaning of the statute of limitations. *Ferris v. Williams*, 1 Cr. C. C., 475.

§ 1151. Under an act providing that if, at the time when any cause of action mentioned in the act shall accrue against any person, he shall be out of the territory, the action may be commenced within the time therein limited therefor, after such person shall come into the territory, it was held that where the maker of a promissory note resided out of the territory at the time when it became due, and afterwards removed into the territory, although the note had been due more than six years, it was not barred by the statute of limitations unless six years had elapsed since the maker came into the territory before the commencement of the action; but that, to prevent the statute from running in such case, the debtor must have been out of the territory when the cause of action accrued. *Brown v. Bicknell*,* 1 Burn. (Wis.), 65.

§ 1152. In an action for a British debt, contracted before 1775, for goods sold to the defendant by a British factor, *held*, that the statute of limitations was no bar, the statute being a legal impediment which was removed by the treaty of peace and the convention of 1802. *Dunlop v. Alexander*, 1 Cr. C. C., 498.

§ 1153. A British subject who, before the treaty of 1794, took a bond in the name of a citizen of the United States, cannot avoid the statute of limitations by claiming the benefit of the clause of the treaty which removed all legal impediments in the recovery of British debts. *Auld v. Hoyl*, 1 Cr. C. C., 544.

§ 1154. If the holder of an accepted bill of exchange be beyond seas at the time his cause of action accrues, and so continues until suit brought, the statute of limitations is no bar, although he was always a resident of the United States. *Irving v. Sutton*, 1 Cr. C. C., 567.

§ 1155. Under the act of limitations of 1789, which provides that the creditors of any deceased person, if they reside without the limits of the state, shall, within three years from the qualification of the executor or administrator, exhibit and make demand or be forever barred, *held*, that the claim of a deceased creditor was not barred until three years after the appointment of his administrator in this country, although, prior to such appointment, an administrator was appointed in England. *Grubb v. Clayton*,* 2 Hayw., 575.

§ 1156. Executors having taken out letters testamentary in Kentucky, improperly sold land situated in Ohio. *Held*, that under the laws of Ohio the statute of limitations only ran as to the devisees who were residents of Ohio. *Dunlap v. Pyle*, 5 McL., 322.

§ 1157. Under the statute of Utah Territory, which provides that "if where (when) the cause of action shall accrue against a person while he is out of the territory, the action may be commenced within the term herein limited after his return to the territory; and if after the cause of action shall have accrued he depart the territory, the time of his absence shall not be part of the time limited for the commencement of the action," *held*, that, notwithstanding the use of the words "return" and "depart," the exception comprehended all persons without and non-residents of the territory as well as citizens of the territory; and that when the parties to a contract sued upon were not residents of the territory at the time the contract was made, or at the time the cause of action accrued upon it, and the party against whom the action is brought has moved into the territory after it accrued, the statute of limitations does not begin to run against the cause of action until he comes into the territory. *Burns v. Crane*,* 1 Utah Ty, 179.

XII. MISCELLANEOUS CASES.

SUMMARY — *Right and limitation provided by same statute*, § 1158. — *Assumpsit to try title to land*, § 1159.

§ 1158. Where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue. *Boyd v. Clark*, §§ 1160-61.

§ 1159. An action of *assumpsit* for money had and received, brought to try the title to land in the city of Washington, is within the Maryland statute of limitations of 1791. *Beatty v. Burnes*, § 1162.

[NOTES.— See §§ 1163-1200.]

BOYD v. CLARK.

(Circuit Court for Michigan: 8 Federal Reporter, 849-852. 1881.)

STATEMENT OF FACTS.—Action based upon a statute of the province of Ontario, which gave damages for causing the death of a person, and limited the period within which suit should be brought to twelve months. Plaintiff's intestate (his son) lost his life while in the service of defendants, by reason of alleged negligence of the master of their steamer on which deceased was an employee.

§ 1160. *Limitations; doctrine of lex fori.*

Opinion by BROWN, J.

It is a well-established principle of law that where a right of action is given by a state statute such right may be enforced in another state, and also that such right will be enforced according to the forms and modes of procedure in use in the latter state. Or, to put it briefly, the *lex loci contractus* governs the rights of parties, but the *lex fori* determines the remedy. This principle has been applied in a large number of cases arising upon contracts, but in the recent case of *Dennick v. Railroad Co.*, 103 U. S., 11 (COURTS, §§ 581-84), it was applied to a statute of this description, where the administrator brought his action in another state. An almost unbroken series of adjudications has also established the further proposition that the time within which an action may be brought relates generally to the remedy, and must be determined by the law of the forum. Hence, it would follow that if this statute contained no limitation of time within which an action must be brought, and the time had been left to depend upon the general statutes of limitations in the province of Ontario, it is clear that we should have disregarded such statute, and permitted the plaintiff to bring this action at any time before actions of this description would be barred by the statutes of this state.

§ 1161. *Where the law of a foreign state creates a liability, gives a remedy, and imposes upon it a limitation, the limitation will control an action brought under such statute in the courts of the United States. Cases cited.*

An exception to this general rule, however, is suggested by Mr. Justice Story, in his *Conflict of Laws* (§ 582), of cases where the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period; and the parties are within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case.

"Suppose, for instance, personal property is adversely held in a state for a period beyond that prescribed by the laws of that state, and, after that period has elapsed, the possessor should remove into another state, which has a longer period of prescription, or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law and the lapse of time, had become final and conclusive before the removal."

The cases of *Shelby v. Guy*, 11 Wheat., 361; *Goodman v. Munks*, 8 Port., 84 (overruled by *Jones v. Jones*, 18 Ala., 248); *Brown v. Brown*, 5 Ala., 508; and *Fears v. Sykes*, 35 Miss., 633, do, in fact, lend support to this distinction; the general tenor of these cases being to the effect that where the statute of one state declares that the possession of personal property for a certain period

vests an absolute title, such prescription will be enforced in every other state to which the property may be removed, or wherein the question may arise.

In the *P., C. & St. L. R. Co. v. Hine*, 25 Ohio St., 629, it was held that under an act requiring compensation for causing death by wrongful act, neglect or default, which gave a right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso was a *condition* qualifying the right of action, and not a mere limitation on the remedy. The accident occurred on the 24th of September, 1870. The suit was begun on the 23d of January, 1873. In March, 1872, the act was amended by increasing the amount for which recovery might be had, and by omitting the limitation contained in the proviso, and also by repealing the section as it stood before. The court held that in creating or giving the right it was within the power of the legislature to impose upon it such restrictions as were thought fit; and if restrictions were imposed, they must be referred to the newly-created right itself, if the restricted language would warrant it; for the act being in derogation of the common law, any restrictive language used in it must be construed against the right created by it. And it was also suggested that it would have been different if the act were merely remedial as to existing rights. It was further held that the plaintiff's rights must be determined as the act originally stood, and was therefore subject to the restrictions contained in the proviso, and the action, not having been brought within the two years, could not be sustained. The case differs from the one under consideration only in the fact that the limitation was contained in a proviso to the section directing in whose name the action should be brought.

In the case of *Eastwood v. Kennedy*, 44 Md., 563, it was held that where a statute of the United States for the District of Columbia gave a claim for the recovery of usurious interest, provided suit to recover the same be brought within one year after the payment of such interest, that it would not be competent for a party to recover in Maryland after the lapse of a year, and that the courts of that state were bound to respect and apply the limitations contained in the act. The cases of *Baker v. Stonebraker's Adm'r*, 36 Mo., 349, and *Huber v. Stiener*, 2 Bing. N. C., 202, are somewhat analogous, but throw little additional light upon the question.

To this extent go the authorities and no further. None of them are controlling here. None are precisely upon all-fours with the case under consideration. We are compelled, then, to deal with it to a certain extent as an original question. The legislature of Ontario has given a right unknown to the common law, but it has seen fit to qualify this right by providing that no more than one action shall lie for the same subject-matter, and that every such action shall be commenced within twelve months after the death of a deceased person.

To permit an action to be brought upon it here after the twelve months would be giving plaintiff a right which the statute he invokes does not authorize, and to that extent nullifying the statute. In the *Dennick Case* the supreme court held that the method of distribution provided by the local act, although a part of the remedy, should be pursued by the court in which the action is brought. It would seem from this that even so far as the remedy is concerned the court will not universally adopt the law of the former. The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be

brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue. It results from this that the action is barred by the statute, and the demurrer must be sustained.

BEATTY v. BURNES.

(8 Cranch, 98-108. 1814.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an action for money had and received, brought by the plaintiffs as administrators of Charles Beatty, deceased, against the defendant as administrator of David Burnes, deceased. The declaration alleges the promise to have been made in the life-time of the respective intestates. The defendant has pleaded the general issue and the statute of limitations of Maryland.

Upon the trial in the circuit court for the District of Columbia, the plaintiffs sought to support their action under the fifth section of the statute of Maryland of November, 1791, chapter 45, concerning the territory of Columbia and the city of Washington. That section is as follows:

“And be it enacted, that all the squares, lots, pieces and parcels of land within the said city, which have been or shall be appropriated for the use of the United States, and also the streets, shall remain and be for the use of the United States; and all the lots and parcels which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchases.”

“And purchases and leases from private persons claiming to be proprietors, and having, or those under whom they claim having, been in possession of the lands purchased or leased, in their own right, five whole years next before the passing of this act, shall be good and effectual for the estate, and on the terms and conditions of such purchases and leases respectively, without impeachment, and against any contrary title now existing; but if any person hath made a conveyance, or shall make a conveyance or lease, of any lands within the limits of the said city, not having right and title to do so, the person who might be entitled to recover the land under a contrary title now existing may, either by way of ejectment against the tenant, or in an action for money had and received for his use against the bargainor or lessor, his heirs, executors, administrators or devisees, as the case may require, recover all money received by him for the squares, pieces or parcels appropriated for the use of the United States, as well as for lots or parcels sold, and rents received by the person not having title as aforesaid, with interest from the time of the receipt; and on such recovery in ejectment, where the land is in lease, the tenant shall thereafter hold under, and pay the rent reserved, to the person making title to and recovering the land, but the possession, *bona fide* acquired, in none of the said cases shall be changed.”

The plaintiffs offered evidence that on the 16th of April, 1792, Charles Beatty, the intestate, returned into the land-office for the western shore of Maryland a certificate of survey, dated on the 3d of April, 1792, and then paid the usual caution money for the land described in said certificate. On the 23d May, 1792, a *caveat* against the issuing of a patent for the lands on said certificate was filed by David Burnes, the intestate, which *caveat* was discontinued on the 23d of May, 1801, by virtue of a certain act of the state of

Maryland. On the same day a patent issued from the land-office to Charles Beatty for the land described in said certificate, which land is within the limits of the city of Washington, and was taken up by Beatty as a vacancy; but Beatty never had actual possession thereof, nor ever claimed to make division thereof with the city commissioners as an original proprietor pursuant to the statute of Maryland, 1791, chapter 45. In fact, the same land had been held and claimed by David Burnes, in his own right, for more than five years before the passing of the statute aforesaid, as included in the lines of a grant made as early as 1720. The plaintiff offered evidence, however, that the land included in Beatty's patent was without the lines of the land to which Burnes was, under his grant, really entitled, and that it was vacant land of the state of Maryland. The warrant under which Beatty's patent was obtained was, before the location, within the limits of Washington, in part located upon and applied to other lands of the state of Maryland, not within the said city, or the county in which it was situate while belonging to Maryland. Burnes in his life-time, and before the statute of 1791, chapter 45, made a conveyance of the land in controversy, as an original proprietor, to certain trustees for the purposes named in that statute, and received of the city commissioners, on account of parts of the same land appropriated to city purposes, the sum of \$7,343.82, in various sums, paid between October, 1792, and June, 1796; and also received \$1,000 on account of other parts of said land, which he sold and conveyed to individuals. Burnes died in May, 1799, and administration of his estate was granted in Prince George's county, in the same year, to his widow, who died in January, 1807. In April, 1803, administration of his estate was granted to the defendant by the orphans' court of Washington county, in the District of Columbia. Beatty died some time before May, 1805, and in that month administration of his estate was granted to the plaintiffs. The present action is brought to recover the money so received by Burnes, upon the ground that it was the proceeds of the sale and disposition of land included in Beatty's patent. No demand or claim was ever made by Beatty on Burnes, or his administrators, in his life-time, for the same money, although both parties, from the year 1791, until their respective deaths, lived within the limits of the District of Columbia, and within two miles of each other—nor did the plaintiffs ever make any demand or claim upon the defendant until February, 1810. Under these circumstances, the court below were of opinion that the plaintiff could not sustain the action, and upon that direction the jury found a verdict for the defendant.

It is contended by the plaintiffs in error that the direction of the circuit court was erroneous. 1. Because the plaintiff's intestate had a good and valid title to the land surveyed under his patent, and was therefore entitled, under the fifth section of the Maryland statute of 1791, to the money received by the defendant's intestate therefor. 2. That this right was not barred by the statute of limitations.

In support of the first point the plaintiffs contend that the land belonging to the state did not, by the cession of the territorial jurisdiction under the statute of 1791, pass to the United States, and was consequently liable to be appropriated by individuals under warrants pursuant to the laws of Maryland. That until 1801 the jurisdiction of Maryland continued over the whole ceded territory, and titles, therefore, might legally be acquired therein according to the public laws; and the patent of Beatty, being obtained in pursuance of those laws, gave him a complete and valid title.

On the other hand, the defendant denies each of these positions, and further contends that the plaintiffs are without the purview of the fifth section of the act of 1791, because that section extends only to titles then existing, and Beatty's title did not commence until April, 1792.

It is not necessary to consider the correctness of the positions urged by the respective parties as to this point, because we are of opinion that the case may well be decided upon the second point.

§ 1162. *Action for money had and received is within the statute of limitations of Maryland.*

The action for money had and received is clearly embraced by the statute of limitations, and it is incumbent upon the plaintiffs to show that the present case forms an exception to its operation.

It is contended that the present suit, being a statute remedy, is not within the purview of the statute of limitations. But we know of no difference in this particular between a common law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. Upon any other construction it would follow that the case would be without any limitation at all; for it would be quite impossible, upon any acknowledged principles, when a right had assumed the shape of a claim *in personam*, to attach to it a limitation which exclusively applied to the reality. Now the statute of limitations has been emphatically declared a statute of repose, and we should not feel at liberty to break in upon its general construction by allowing an exception which has not acquired the complete sanction of authority.

It is further contended that, by the operation of the act of 1791, chapter 45, Burnes must be considered as a mere trustee of Beatty, and trusts are not within the statute of limitations. We are of a different opinion. The land in controversy was claimed by Burnes in his own right, and adversely to the plaintiff's intestate. The money was received by him for his own use and in his own right as an original proprietor. He never admitted or acknowledged the title of the plaintiff, and no claim or demand was ever made upon him in his life-time. So far, then, from being received in trust, it was expressly received under a peremptory denial of any trust or right in the opposite party. Nor was the statute meant to make the adverse possessor without title a trustee for the party having title. It only substituted the action of *assumpsit* for the ordinary legal remedy by ejectment, and the adverse possessor of the land could no more be deemed a trustee of the money than he could be deemed a trustee of the land itself, for the benefit of the rightful owner, against whom he held by an adverse title.

The court are, therefore, of opinion that the statute of limitations is a good bar, and, therefore, that the judgment must be affirmed.

§ 1163. *When an action is deemed commenced.*—Where, by its charter, a corporation is given a summary method of collecting debts by the issuing of an execution, without having an action commenced by the service of process and the prosecution of the suit to judgment, the action is deemed commenced when the execution is issued. So held where the charter of a bank authorized the clerk of the general court or county to issue an execution against the debtor of the bank upon proof by affidavit of certain officers of the bank of a demand and non-payment. *Bank of Columbia v. Sweeney*,* 2 Pet., 671; *Bank of Columbia v. Sweeney*,* 2 Cr. C. C., 704.

§ 1164. *Application of particular statutes.*—The act of congress of 1825 (4 Stat. at Large, 102), which exonerates sureties after two years, does not apply to a case where a running ac-

count is kept at the postoffice department between the United States and a postmaster, in which all postages are charged to him and credit is given for all payments made, the balance due from the postmaster being thrown on the last quarter. *Jones v. United States*, 7 How., 881.

§ 1165. The thirty-fourth section of the judiciary act only embraces property laws, and laws concerning personal rights, and not mere forms of procedure. *Read v. Miller*, 2 Biss., 14.

§ 1166. The act of Virginia of 1792, to regulate proceedings on judgments, is substantially and technically a limitation on judgments. *Ross v. Duval*, 18 Pet., 45.

§ 1167. The Kentucky act of 1809 extended to the lands west of Tennessee river, together with all other laws of the state, as soon as the restrictions of the Indian treaties were removed, and extended there before that subject to the restriction of said treaties. *Porterfield v. Clark*, 2 How., 76.

§ 1168. The statute of limitations of Indiana allows the defendant to plead the statute of his residence at the time his liability is incurred. So held in an action brought in Indiana against an obligor on an administrator's bond given in Maryland, defendant's former place of residence, to which he pleaded the statute of Maryland. *Maryland ex rel. v. Todd*, * 1 Biss., 69.

§ 1169. Corporations.—A foreign corporation has no rights in Nevada to the benefit of the statute of limitations. *Mining Co. v. Taylor*, 10 Otto, 37.

§ 1170. A religious corporation can plead the statute of limitations in New York. So held in an action in New York to recover certain lands to which the defendant, a corporation, set up the statute. *Harpending v. Dutch Church*, 16 Pet., 455 (§§ 57-64).

§ 1171. A foreign corporation cannot plead the statute of limitations in an action commenced in New York. So held in an action brought by a New York corporation in New York against a Pennsylvania corporation, which operated a railroad within New York. *Tioga R. R. Co. v. Blossburg, etc., R. Co.*, * 20 Wall., 137, affirming *Blossburg R. Co. v. Tioga R. Co.*, * 5 Blatch., 387.

§ 1172. The Virginia statute of limitations bars the action whatever may be the character or condition of the plaintiff, unless it comes within one of the exceptions. The Bank of the United States being a party to a contract made at Richmond, acting by its agents who resided there, at a banking house established by it there, and that being the place of performance, is not a non-resident within the meaning of the exception. So held in an action brought by the Bank of the United States on a note indorsed by defendant. The note was discounted at a branch bank at Richmond and was there protested for non-payment in December, 1821. The action was commenced in 1828. The Virginia statute of limitations barred the action after five years, but excepted from its effects persons beyond seas and out of the country. The bank's main office was in Pennsylvania. Judgment was given for defendant. *Bank of the United States v. McKenzie*, * 2 Marsh., 393.

§ 1173. Limitation by contract.—A limitation prescribed by contract is not to be construed like that prescribed by statute. *Semmes v. Hartford Ins. Co.*, 18 Wall., 158.

§ 1174. The limitation of a right to sue by contract is extinguished by a disability which deprives the party of power to bring an action within the time limited. Such limitation does not become operative upon the removal of the disability. *Semmes v. Hartford Ins. Co.*, 18 Wall., 161.

§ 1175. A condition contained in a policy of insurance, that no suit or action of any kind against the company shall be sustained under the policy, unless the action be commenced within twelve months after the loss shall occur, and in case an action shall be commenced after that time, the lapse of time shall be conclusive evidence against the validity of the claim, is valid, and the courts will not sustain suits brought after the limitation accrues. *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall., 386.

§ 1176. Where a policy of insurance provided that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action should accrue, and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up, held, that a plea setting up such provision and the lapse of the time specified, in bar of an action on the policy, was a conclusive answer to the suit. The right to indemnity in case of loss, and the liability of the insurer therefor, do not, under such a provision, become absolute unless the remedy is sought within the period limited. The stipulation goes to the right as well as the remedy. *Cray v. Hartford Fire Ins. Co.*, 1 Blatch., 280.

§ 1177. Presumption—Abandonment.—Payment and improvement of the property rebuts any presumption of abandonment arising from lapse of time. *Piatt v. McCullough*, 1 McL., 69.

§ 1178. Presumption of payment.—After the lapse of twenty years a presumption of payment may arise, and, under peculiar circumstances, even a shorter period will be sufficient. This presumption may be rebutted by circumstances excusing the making of a demand or the institution of a suit. The jury was so charged in an action on a promissory note which had

been due about twenty years. To rebut this presumption it was shown that defendant had lived under embarrassed circumstances, but his insolvency, or a demand either upon him or any other promisor, was not shown. A motion for a new trial made by plaintiff was refused. *Denniston v. McKeen*, * 2 McL., 253.

§ 1179. At common law a lapse of sixteen years raises a *prima facie* presumption of payment; after twenty years the presumption is conclusive. *Didlake v. Robb*, 1 Woods, 682.

§ 1180. Payment of a bond will not be presumed from lapse of time short of a period of twenty years. *Cottle v. Payne*, * 3 Day (Conn.), 289.

§ 1181. In an action on a bond payable in instalments the jury may infer payment of an instalment which is past due nineteen years and ten months, and ought to presume payment of one past due twenty years. *Miller v. Evans*, * 2 Cr. C. C., 72.

§ 1182. Lapse of time will authorize presumption of payment of a bond, notwithstanding the indorsement of a payment by the obligee, if such indorsement was not made with the privity of the obligor. *Kirkpatrick v. Langphier*, * 1 Cr. C. C., 85.

§ 1183. The lapse of twenty years creates a presumption of payment, if no interest has been paid in the meantime. If a shorter period is relied upon, the presumption should be fortified by circumstances. *Goldhawk v. Duane*, * 2 Wash., 323.

§ 1184. The effect of lapse of time upon a judgment is the presumption of payment, to dispel which facts must be shown which will be sufficient to warrant the court in laying the matter before the jury for their decision. *Morris' Estate*, Crabbe, 70.

§ 1185. The bar of the statute of limitations is founded upon presumption of payment, not a presumption of fact, but a conclusive presumption of law. *In re Kingsley*, 1 Low., 216.

§ 1186. **Bankruptcy.**— Courts of bankruptcy, like courts of equity, recognize statutes of limitations. *In re Eldridge*, 2 Hughes, 256.

§ 1187. **Judgments.**— The act of limitations of Virginia of the 19th of December, 1792, page 107, is not a bar to a judgment, if execution has been issued thereon, and returned within ten years after the date of the judgment. *Irwin v. Henderson*, 2 Cr. C. C., 167.

§ 1188. **National banks.**— Under section 30 of the national bank act, approved June 3, 1864, providing that in case a greater than the specified rates of interest has been paid, the person paying the same may recover back twice the amount thus paid if action be commenced within two years from the time the usurious transaction occurred; no usurious interest paid more than two years prior to the commencement of the suit can be recovered, nor can it be credited on the principal of the note. *National Bank of Madison v. Davis*, 8 Biss., 100.

§ 1189. **Miscellaneous.**— No cognizance taken of tacit liens, when the circumstances raise a presumption that the lien was waived. Lapse of time alone will not make a demand stale. *The Buckeye State*, Newb., 111.

§ 1190. Where a testatrix gave her executors certain powers over real estate, and the only one qualifying died, and an administrator was appointed, and a judgment was obtained against the administrator, and a proceeding was brought to enforce the same, to which the administrator pleaded the statute of limitations, it was held that, as in Maryland an administrator did not succeed to the powers of the executors over realty, the plea interposed by him could not avail those who represented the real estate. *Ingle v. Jones*, 9 Wall., 486.

§ 1191. The statute of limitations cannot be set up as a defense to an action by the reclamation district to enforce the collection of the assessments. *Reclamation District v. Hagar*, 6 Saw., 567.

§ 1192. The plea of the statute of limitations to a bill in equity having been overruled and a demurrer to a bill of revivor having been allowed, *held*, on motion to amend the bill, that the judgment of the court on the plea of the statute previously filed by the defendants was conclusive on the parties who pleaded it, and their privies; that they could not again set up the same matter as a bar, though it might be done by new parties (not privies to the parties who made the plea) to the original, the supplemental or bill of revival, but that the staleness of the demand was no objection to the amendment of the bill. *Fisher v. Rutherford*, Bald., 188.

§ 1193. In allowing claims against a trust fund as between contending creditors, a claim upon a judgment of more than twelve years' standing must be rejected without the statute of limitations having been pleaded, as there was no time when the debtor or his administrator could plead it. *Farmers' & Mechanics' Bank v. Melvin*, 2 Cr. C. C., 614.

§ 1194. A register of the treasury of the United States is entitled to a reasonable compensation as agent for disbursing the money appropriated for the contingent expenses of the treasury department, library of congress and other appropriations for public purposes, although at the same time he discharges the duties and receives the pay of register of the treasury, and such compensation is not barred by the statute of limitations. *United States v. Nourse*, 4 Cr. C. C., 151.

§ 1195. The governor and judges in the first stages of the territorial government of Michigan had power to adopt the laws of the respective states, but had no legislative authority. A

law adopted from Vermont in 1820 was adopted in the statute of limitations, in which the word "or" was used instead of the word "and," giving the benefit of the statute to a person beyond the limits of the state, whereas the Vermont statute required the person not only to be beyond the limits of the state, but of the United States. In 1825 a commission was appointed to revise the laws, and was authorized to alter or report new bills, etc. The report of the commission included the law in question, with others, and in 1827 all the laws in force were published by authority, there being no alteration in this act. There was another revision of the laws in 1833, which was again published by authority, making no alteration in this act. *Held*, that, under the circumstances, the court could not look back to the law of Vermont to correct any error on the first adoption of the law. *Peok v. Pease*, 5 McL., 486.

§ 1196. The twenty-second section of the original judicial act (act of 1789), limiting the period within which writs of error may be brought to five years after the rendition of the judgment or decree complained of, applies only to writs of error in law and does not extend to writs of error *coram nobis*. *Strode v. The Stafford Justices*, 1 Marsh., 162.

§ 1197. The act of New York entitled "An act limiting the period of bringing claims and prosecutions against forfeited estates," was not intended to bar those against whom the forfeiture had passed, but to bar the claims of strangers to the forfeiture, whose lands might have been sold by the commissioners under the supposition that they belonged to another whose estate had been forfeited. *Fisher v. Harnden*, 1 Paine, 55.

§ 1198. In an action on the case for fraudulent representations, tried before the court without a jury, *held*, that the fact that the action was brought two days only before the statute of limitations would have barred the suit was not *per se* an objection to the suit, but that it must operate in point of evidence upon the case, as lapse of time necessarily renders all testimony more obscure and less easy of precise ascertainment, from the frailness of memory, from subsequent changes of opinion, or from other circumstances. *Sanborn v. Stetson*, 2 Story, 481.

§ 1199. In a suit against executors, a paid legatee is not an incompetent witness by reason of interest, where payment has been made by the creditor voluntarily, with knowledge of the claim sued upon, and without a refunding bond, especially when a sufficient length of time has elapsed since the death of the testator to bar any suit against such legatee by creditors of the testator in case his legacy was improperly paid. *Wilcox v. Phillips*, 1 Wall. Jr., 47.

§ 1200. The act of Pennsylvania of March 25, 1813 (6 Smith's Laws, 61), merely repeals the act of March 11, 1800 (3 Smith, 421), which repealed the act of limitations of 1785, after two years from the date of the former act, except as to those who should bring their actions within the two years; and as to these, the act of 1800 continues in force. *Fellows v. Pedrick*, 4 Wash., 477.

LIQUIDATED DAMAGES.

. See CONTRACTS, X, 2.

LIQUORS.

[See CONSTITUTION AND LAWS; CRIMES; INDIANS. As to Internal Revenue Laws, see REVENUE.]

§ 1. A license by the federal government to engage in the sale of intoxicating liquors is no bar to an indictment in a state court under a state law prohibiting the sale of such liquors. *Pervear v. The Commonwealth*, 5 Wall., 475.

§ 2. A person holding a license, granted by the United States, to engage in the wholesale liquor business in a particular state, is not empowered thereby to carry on such business in that state, if the laws of such state forbid the carrying on of such business within its borders. *McGuire v. The Commonwealth*, 3 Wall., 387.

§ 3. Sale on credit.—The sixth and seventh sections of the statute of Michigan to regulate taverns, approved 23d of April, 1833, provided that "if any tavern-keeper shall trust any person other than travelers, above the sum of \$1.25, for any sort of spirituous liquors, . . . he shall lose every such debt," and made void any note or security for the same. *Held*, that after the repeal of the law, such prohibited charges, made while it was in force, might be sued for and recovered. *Bird v. Fake*,* 1 Burn. (Wis.), 131.

§ 4. The act of the assembly of Virginia, December 26, 1793, section 13, which prevents a tavern-keeper from recovering more than \$5 for liquors sold in one year, to one person residing less than twenty miles from such tavern, to be drank in the place where the tavern is kept, applies to boarders, unless such boarders have families or domiciles more than twenty miles from the place where the liquor was sold. *Kooner v. Thomee*, 1 Cr. C. C., 290.

§ 5. **Powers of cities.**—In the absence of general legislation on the subject which is controlling, cities and towns may exact a corporate license of persons who desire to engage in the sale of intoxicating liquors, and may punish persons who sell without such license. *City of Elk Point v. Vaughn*,* 1 Dak. Ty, 118.

§ 6. **Suit for price of liquors.**—Where a person doing business in one state sells liquors to a person doing business in another state, he may recover the price of the goods by a suit in the latter state, though he knew they were to be sold in violation of the laws of such state. *Sortwell v. Hughes*,* 1 Curt., 244.

§ 7. **Sale without license.**—Under the act of Virginia prohibiting the sale of spirituous liquors without license, all the acts of selling before conviction constitute but one offense. *United States v. Gordon*, 1 Cr. C. C., 81.

§ 8. **Selling less than a pint, under a license to sell not less than a pint, is selling without license.** *United States v. Squaugh*, 1 Cr. C. C., 174.

§ 9. **The holding of a county license for the sale of intoxicating liquors is no bar or defense to a prosecution for selling such liquors without a city license.** *City of Elk Point v. Vaughn*,* 1 Dak. Ty, 118.

§ 10. **The fact that a party is liable to punishment under the territorial law for selling intoxicating liquors on the Sabbath does not prevent his prosecution for selling said liquors on said day without a city license.** *Ibid.*

§ 11. **A person who, having a stock of liquors on hand after his license has expired, sells, or offers to sell, any of such liquors without obtaining a new license, is liable for violation of the law.** *United States v. Angell*, 11 Fed. R., 34.

§ 12. **A receipt for tax paid for selling spirituous liquors has no retrospective effect, and is no defense to a prosecution for selling liquors without license before the tax was paid.** *Ibid.*

§ 13. **The widow and administratrix of a deceased tavern-keeper cannot sell spirituous liquors under her husband's license; nor can she transfer it to another.** *United States v. Overton*, 2 Cr. C. C., 42.

§ 14. **An indictment for retailing spirituous liquors within the city of Washington without license, under the act of Maryland, will not lie.** *United States v. Dixon*, 2 Cr. C. C., 92.

§ 15. **Information.**—In an information for selling spirituous liquors without license, it is not necessary to specify the kind of liquor, nor the person to whom sold. *United States v. Gordon*, 1 Cr. C. C., 58. See **CRIMES**.

§ 16. **Indictment.**—An indictment which charges the defendant with unlawfully selling intoxicating liquors, to be drank in and upon the premises where sold, without having obtained a license and given bond as required by law, is sufficient, without describing the premises where, the person to whom, or the particular kind or quality of liquor sold. *The People v. Sweetser*,* 1 Dak. Ty, 308. See **CRIMES**.

§ 17. **Retailer.**—The gratuitous distribution of ardent spirits at a public gaming table does not constitute the keeper of the table a retailer of spirituous liquors, within the meaning of the act of the assembly of Maryland. *United States v. Mickle*, 1 Cr. C. C., 268.

§ 18. **Where a person purchases liquor in his own name, has it shipped to him in his own name, and deals it out to customers as called for, he must be considered a retail dealer, although the money with which he made the purchase was furnished to him by others, and he purchased and sold the liquor without profit to himself.** *United States v. Angell*, 11 Fed. R., 34.

§ 19. **Evidence.**—On the trial of an indictment for carrying on the business of retail dealer in liquors, on a day named, without a license therefor, evidence is competent of the sale of a glass of liquor on the next subsequent day, from a store long occupied by the defendant, and in a bar-room therein fitted up as a retail liquor shop. *United States v. Riley*, 5 Blatch., 204.

§ 20. **The day of selling spirituous liquors is immaterial if proved to be within twelve months before filing the information.** All the acts of selling before the filing of the information are parts of the same general offense of selling without license. *Commonwealth of Virginia v. Smith*, 1 Cr. C. C., 46.

§ 21. **Where a statute provided, "If any person or persons shall barter, sell, or dispose of in any manner, any spirituous liquor," etc., and the jury was instructed that "if the liquor was given gratuitously, it would sustain the indictment equally as if it had been sold and paid for," held, to be error.** *Wood v. Territory*,* 1 Or., 228.

§ 22. **Alaska.**—Congress has power to authorize the president to regulate or prohibit the sale or introduction of distilled spirits into the district of Alaska. *The Louisa Simpson*, 2 Saw., 57. See **INDIANS**.

§ 23. **Distilled spirits brought from a port outside of the district of Alaska into the waters within the headlands of Point Hope and Cape Prince of Wales, and there disposed of, or with the intent to unload or dispose of them, is an importation into such district within the meaning of the prohibitory order of the president, made in pursuance of the act of July, 1868.** *Ibid.*

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MANDAMUS.

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See CONTRACTS; PATENTS, §§ 1539-1630; TORTS.

MECHANICS' LIENS.

See LIENS.

MENTAL WEAKNESS.

See CONTRACTS, IV, 4; INSANITY.

MERGER.

[See CONTRACTS; CONVEYANCES.]

§ 1. Contracts.— Where B. and I. were liable for duties on imported goods, and B. gave his separate bond therefor, *held*, that the bond, although given by one partner, and although B. and I. had previously agreed that both should be bound by any bond executed by either, extinguished the debt for which it was given, and made it the separate debt of B. *United States v. Astley*, 8 Wash., 508. See CONTRACTS.

§ 2. An agreement under seal to come to a settlement within a limited period, and to pay the balance found due upon such settlement, is but a collateral undertaking, and does not operate as an extinguishment of the original debt upon simple contract; and the period agreed upon having elapsed without a settlement being made, such covenant is no defense to suit on the simple contract. *Baits v. Peters*, 9 Wheat., 558.

§ 3. Although a security under seal, being of a higher nature, extinguishes a simple contract debt, this effect cannot be attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation. *Bank of Columbia v. Patterson*, 7 Cr., 299.

§ 4. Where parties to one contract execute a second, which differs from the first, they must be deemed to have voluntarily abandoned the first contract, and they cannot recover under the first when performing under the second. *Parish v. United States*,* 1 Ct. Cl., 366.

§ 5. Where a new contract has been substituted for an old one, and then has been repudiated by the plaintiff, that fact forms a good defense in an action on the original contract. *Hitchcock v. City of Galveston*, 8 Woods, 298.

§ 6. Where a new contract is made between the same parties and in relation to the same subject-matter, the old will not be merged in the new unless it be delivered up and canceled, or, it seems, unless they are wholly inconsistent with each other. *Avery v. Hackley*, 20 Wall., 411.

§ 7. An executed agreement is not extinguished by the mere recital of it in a later one, although the latter be under seal. *Bank of Columbia v. Patterson*, 7 Cr., 299.

§ 8. After the execution of a chattel mortgage the parties entered into a new agreement by which, on his giving proper security, the mortgagor should receive back the goods and sell them, and apply the proceeds to the debt. In an action on such contract, it was held to be no defense to the action that the mortgage had been assigned to the security, and that the new agreement was a substitute for the mortgage, and that the creditor relied on the personal security of the debtor and the security rather than on the mortgage. *Harper v. Neff*, 6 McL., 391.

§ 9. The agent of an insurance company entered into a bond to the company conditioned that he should faithfully perform his duties and faithfully pay over all moneys, etc., and which provided that it should continue in force during the continuance of the agreement as to commissions under which it was entered into, and during the continuance of any future agreement. Two years afterwards a new contract was entered into between the company and the agent, which provided for a different compensation, and which provided that it should abrogate all former contracts as far as new business was concerned. *Held*, that the bond was not abrogated by the new contract. *Boogher v. Insurance Co.*, 13 Otto, 98.

§ 10. By the common law, a simple contract debt is not extinguished by the creditor's taking a new security for it, unless the security be of a higher nature, as an instrument under seal, or unless it be agreed to be received in satisfaction of the debt; but by the law of Maine, if a negotiable security be given for a pre-existing simple contract debt, the legal presumption is that it is an extinguishment of the original cause of action; but this presumption is liable to be controlled by proof to the contrary. The presumption of the local law, however, will not be enforced in admiralty against a seaman who receives of the owners their negotiable note for his wages. Such note will not be held to be an extinguishment of his claim, nor of his lien against the ship, unless it is distinctly stated to him at the time that such will be the effect, and the note is accompanied by some additional security or advantage to the seaman, as a compensation for his renouncing his lien on the vessel. *The Betsy and Rhoda*, Dav., 112.

§ 11. **Mortgages.**—There cannot be a merger of a mortgage and fee unless the two interests are united in one person. Thus where a mortgagee transfers a mortgage a short time before receiving a conveyance of the fee to the mortgaged premises, there is no merger; and this is so although the conveyance of the fee is recorded, while that of the mortgage is not. *Oregon & Washington T. L. Co. v. Shaw*, 5 Saw., 336; 6 Saw., 52.

§ 12. Even if the mortgage and fee become united in the mortgagee there is no merger, if the mortgagee manifest his intention to keep the mortgage and fee separate by conveying the former. *Ibid*.

§ 13. Where a senior mortgagor wrongfully carried away a portion of the property subject to his own and a junior mortgage, *held*, that his debt was not extinguished by what is termed in the civil law "confusion" (equivalent to "merger" as used in the common law), to the extent of the value of such property; that he was a mere tort-feasor, and that no part of his debt could be merged or extinguished by a credit or set-off arising from unliquidated damages for a trespass. *Palmer v. Burnside*, 1 Woods, 179.

§ 14. Where a mortgagee brought an action on mortgage bond, obtained judgment, had a portion of the mortgaged premises levied upon and sold, and he became the purchaser, on the

supposition that an equity of redemption could be sold on execution, *held*, that, as to the part sold, the equity purchased merged in the legal estate. *Hill v. Smith*, 2 McL., 446.

§ 15. A purchaser cannot rely upon the record as showing merger, inasmuch as merger generally takes place or not according to the actual or presumed intention of the mortgagee. He must go beyond this and ascertain whether there has been a merger in fact; and he acts at his own peril if he does not require his grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title of the estate. A purchaser of property, on which the record shows there is an unsatisfied mortgage, takes it with notice that there is an existing lien in the hands of somebody. His interest is liable to that lien, if it is not in the hands of the mortgagor. *Oregon Trust Co. v. Shaw*, 5 Saw., 336.

§ 16. When the mortgagor's assignee becomes virtually the holder of the debt meant to be secured thereby, the equitable or legal titles merge in him, and he becomes the sole owner. *Upham v. Brooks*, 2 Woodb. & M., 407, 416.

§ 17. At law a mortgage conveys the legal title to the property, and a subsequent release of the equity of redemption to the mortgagee does not operate to merge the legal and equitable titles, but merely to extinguish the equity of redemption. *Dexter v. Harris*, 2 Mason, 531, 539.

§ 18. A junior incumbrancer, upon paying a prior lien covering the same property and other property also, is subrogated to the position of the prior incumbrancer, and may enforce the prior lien upon such other property to the relief of that covered by the junior incumbrance. *Peter v. Smith*, 5 Cr. C. C., 383.

§ 19. It is a well settled principle in equity that a junior mortgagee who is compelled to pay off a prior incumbrance upon the land is subrogated to the rights of the prior incumbrancer and may claim all the benefits of his lien. *Bank of the United States v. Peter*, 13 Pet., 123. Where one of three joint mortgagors pays the debt, the mortgage, after notice to the mortgagee, will stand as security for two-thirds of the debt in favor of such mortgagor. *Pratt v. Law*, 9 Cr., 456; *Campbell v. Pratt*, 5 Wheat., 429.

§ 20. If one of several mortgagees obtains an annulment of a tax sale of the mortgaged property, this inures to the benefit of all the mortgagees of the property so far as the vacating of the tax conveyance is concerned, though the mortgagee who obtained such annulment is entitled to be reimbursed out of the mortgaged property. *Weaver v. Alter*, 3 Woods, 152.

§ 21. *Estates in land.*—Where the legal estate and trust estate are co-extensive, as in fee, and both become vested in the same person, there is a merger of the trust estate in the legal estate. *Robinson v. Codman*, 1 Sumn., 121.

§ 22. Where an estate out of which a mill privilege has been carved becomes united in ownership with another estate below, all privileges with respect to such separate estates become merged, so that the owner of both may convey different rights and privileges from what were before attached to either estate; but in conveying either to different and new persons, any change in the privileges made appurtenant to each must distinctly appear, or each will be presumed to exist as before the junction of the estates. *Perry v. Parker*, 1 Woodb. & M., 280.

§ 23. A legal term for years does not merge in an equitable title to the reversion. Thus, where A., a lessee for ninety-nine years, renewable forever, at a certain rent, sold to B., by deed of bargain and sale, the demised premises, together with other lots and lands in which he had a fee-simple estate, "to have and to hold the aforesaid lots or parcels of land, to the said B., his heirs, executors, administrators or assigns, forever," with general warranty of "the said lots or parcels of lands," *held*, that B. acquired the legal estate in the term for years only, although A. had, at the time of the conveyance, an equitable title to the reversion; and that the subsequent sale of the reversion by A. to C., and a conveyance to him from the original lessor, were valid and transferred the reversion to C. *Little v. Ott's Heirs*, 3 Cr. C. C., 416.

§ 24. Where a devisee in remainder in fee purchases the life estate, he becomes owner in fee-simple, the life estate being merged in the remainder. *Webster v. Gilman*, 1 Story, 499.

§ 25. *Notes.*—In the courts of the United States a note is not regarded as a merger of the original consideration, but it is doubtful whether the terms of the note, as to time, place and manner of payment, are restrictive, and govern, in any way or to any extent, the right to recover on the original debt. *Brown v. Noyes*, 2 Woodb. & M., 75.

§ 26. *Official bonds.*—The balance due from a public officer on account is not merged in his official bond, given with sureties, so as to prevent suit against him in his individual capacity for the balance due. *Walton v. United States*, 9 Wheat., 651.

§ 27. *Judgments.*—Bonds upon which judgments are rendered are merged in the judgments and have no legal existence whatever. *United States v. Astley*, 3 Wash., 508. See JUDGMENTS.

§ 28. A judgment rendered in a state court is conclusive in every other state, and extinguishes the original ground of action. *Green v. Sarmiento*, Pet. C. C., 74.

§ 29. A judgment against one, upon a joint contract of several persons, bars an action against the others, the entire cause of action being merged in the judgment. But this common law rule is changed by the statute of Michigan, which provides that judgment against joint obligors "shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence." *Mason v. Eldred*, 6 Wall., 231; 16 Am. L. Reg., 402.

§ 30. If a judgment is obtained against one partner, in a suit on a partnership note against all the partners, the note is merged in the judgment, which may be pleaded in bar in an action on the instrument against one or all of the partners. *Woodworth v. Spaffords*, 2 McL., 168.

§ 31. When a judgment is obtained against one of two partners on a joint promise, the contract is merged in the judgment, and an action at law cannot be maintained against the partners on the same ground. *Sedam v. Williams*, 4 McL., 51.

§ 32. Where A., having given a bond with sureties for the faithful performance of his duties as collector of customs, subsequently gave an additional bond with a different surety, and a judgment was perfected against him on the latter bond, *held*, in a joint action against the obligors in the former bond, that the second bond did not operate as a merger or extinguishment of the first, being a security of no higher degree, and that judgment on the second bond could not, unless it was followed by satisfaction, have any effect on the first bond. *United States v. Hoyt*, 1 Blatch., 826.

§ 33. Judgment was confessed by one partner against himself and the other members of the firm, and an assignment made to secure the judgment. This judgment was afterward set aside as to a partner not joining in the confession. Whereupon the judgment creditors had the judgment set aside as to the remaining partners, and brought suit on the original notes, on which the judgment set aside had been rendered. It being objected in this suit that the notes were merged in the judgment, the court held that the whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived. *Clark v. Bowen*, 23 How., 270.

§ 34. Where a deed of trust was executed to secure the payment of certain notes, and a judgment was obtained on the notes, *held*, that the judgment did not operate as an extinguishment of the right of the holders of the note to call for the execution of the trust. *Bank of the Metropolis v. Gutschlick*, 14 Pet., 19.

§ 35. By the substitution of a new contract for an original debt, the old debt is not merged in, or extinguished by, the new contract, if such substitution be conditional, and the conditions are not fully complied with. *Hyde v. Booraem*, 16 Pet., 169.

§ 36. A note is merged in a judgment rendered upon it, and the latter is thereafter the evidence of the debt. *Connecticut Mutual Life Ins. Co. v. Jones*, 1 McC., 888.

§ 37. A foreign judgment does not operate as a merger of the original cause of action, and cannot be pleaded in bar of an action founded thereon. *Lyman v. Brown*, 2 Curt., 559.

§ 38. Although, where two or more are bound jointly and severally, the obligee may elect to sue jointly or severally, having made his election and obtained a joint judgment, his bond is merged in the judgment, and no suit can thereafter be brought against any of the obligors or their representatives severally on such bond. *United States v. Archer*, 1 Wall. Jr., 173.

§ 39. Crimes.—In Maine an action may be maintained for the private wrong, although the act which is the foundation of the suit amounts to a felony, the doctrine of the common law, founded on the principles of the feudal system, that a private wrong is merged in a felony, not being applicable to the civil policy of this country, and never having been adopted in that state. *Plummer v. Webb*, 1 Ware, 69.

§ 40. At common law the civil rights of a party injured by a felonious act are not merged in, or wholly suspended by, the rights of the government to punish the same, but merely suspended until the rights of the government to punish it criminally have been satisfied. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 41. There is no merger in crimes of equal rank, such as misdemeanors; and it is competent for the government to put defendants on trial under a charge under section 5440, Revised Statutes, for conspiracy to commit the offense created by section 5443, Revised Statutes, where they have never been called in question for the same act by a charge under the latter section. *United States v. De Grief*, 16 Blatch., 20.

§ 42. Though misdemeanors may be merged in felonies, yet there can be no merger of misdemeanors among themselves, even though one is more severely punished than the other. *United States v. McDonald*, 3 Dill., 543.

§ 43. Conspiracy to commit a misdemeanor is not merged in the completed object of the conspiracy. *United States v. Martin*, 4 Cliff., 156.

MESNE PROCESS—MINERAL LANDS.

MESNE PROCESS.

See WRITS.

MESNE PROFITS.

See LAND.

MEXICAN CLAIMS.

See ARBITRATION AND AWARD, §§ 88, 89, and ASSIGNMENT, §§ 44, 45, case of *Judson v. Corcoran*,* 17 How., 662.

MEXICAN TITLES.

See LAND.

MICHIGAN.

See STATES.

MILITARY COMMISSION.

See WAR.

MILITARY GOVERNMENT.

See WAR.

MILITARY SERVICE.

See WAR.

MILITARY STORES AND SUPPLIES.

See GOVERNMENT; WAR.

MILITIA.

See WAR.

MINERAL LANDS.

See MINES.

MINES AND MINERAL LANDS.

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| I. IN GENERAL, §§ 1-31. | IV. LODES AND VEINS, §§ 167-182. |
| II. TITLE TO MINES AND MINERAL LANDS, §§ 32-67. | V. WATER RIGHTS, §§ 183-195. |
| III. LOCATION OF MINING CLAIMS, §§ 68-166. | VI. TAXING ORE AND CLAIMS, §§ 196-198. |

I. IN GENERAL.

§ 1. Local mining laws.—In order to introduce in evidence the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give certified copies so as to become evidence, and that such was a copy of the laws prevailing and in force in the district at the required date. *Roberts v. Wilson*,* 1 Utah T'y, 292.

§ 2. The act of congress granting certain rights to those who discover, take up, and work mining claims, refers the parties to the local laws of the states and territories, and to the rules, regulations and customs of miners of the district where the mines are situated, for the measure of their rights; and when the real controversy is as to what such local laws, rules, regulations and customs are, or whether the parties have conformed to them, the fact that the claim, in regard to which the controversy exists, was located under the acts of congress, will not give a federal court jurisdiction of the suit as "arising under the constitution and laws of the United States." *Trafton v. Nougues*, 4 Saw., 178.

§ 3. Tailings.—Rights of subsequent locators.—If first locators of mining claims work them with reasonable care and diligence, slight injuries to subsequent locators below them would be *damnum absque injuria*; but first locators have no right to let their tailings run free in the gulch, and thus destroy the value of subsequent claims located below them, nor will the law tolerate a custom of miners in support of such practice. The custom of free tailings conflicts with the rule that locators must distinctly mark and define the ground set apart for the deposit of their tailings, and thus notify persons desiring to locate what ground is vacant. *Lincoln v. Rodgers*,* 1 Mont. T'y, 217.

§ 4. A lease of land for the purpose of mining oil, coal and other minerals vests a corporeal interest in the business described in the lease, which is the proper subject of an action of ejectment. *Barker v. Dale*,* 3 Pittsb. R., 190; 17 Pittsb. L. J., 19.

§ 5. A clause in a lease of mining land, by which the lessee was to commence operations by the 1st day of April, 1866, is not a condition, the non-performance of which determined the lessee's rights, or worked a forfeiture of the lease. *Ibid*.

§ 6. The time fixed in a lease of mining ground, within which the lessee was to commence operations, is of the essence of the contract, so far as to enable the lessor, after its expiration, to maintain an action against the lessee for the non-performance of his stipulation, but not so as to divest his interest under the lease. *Ibid*.

§ 7. A lease of premises, for the purpose of mining for oil, coal and other minerals, subject to lessor's "use of the same for the purpose of tillage," is exclusive of any right of the lessor to mine or excavate within the defined limits for oil or minerals. *Ibid*.

§ 8. If a lease of mining ground contains a clause by which the lessee is to commence mining operations by a certain date, which he fails to do such lessee cannot recover in an action of ejectment against a subsequent lessee of the same ground under the same lessor, if his failure to comply with the agreement in the lease is shown to have arisen from an intention on his part to surrender the lease and to abandon altogether the prosecution of mining operations. *Ibid*.

§ 9. Lead mines.—The several acts of congress, passed prior to 1842, relating to the saline and mineral lands, confer a general authority upon the president to lease the lead mines in that portion of the territory of Iowa west of the Mississippi river. *Leasing of Lead Mines*,* 4 Op. Att'y Gen'l, 93.

§ 10. The president of the United States has no power by virtue of his office, and independent of statutory authority, to lease the lead mines in the territory of Iowa, nor was such power granted by either of the acts of congress passed March 3, 1807, relating to mines upon public lands. *Lorimier v. Lewis*,* 1 Morris (Iowa), 253.

§ 11. The fifth section of the act of congress of 3d March, 1807, authorizing the president to lease lead mines, etc., within the Indiana territory, does not limit the exercise of the power to the boundaries of Indiana as they might be afterwards changed, and no subdivision of the territory, or change from a territorial to state government, can affect the exercise of the power. The fact that the lead mine in question is within the state of Illinois is of no conse-

quence. Such a regulation in no respect interferes with the sovereignty of the state or any local law which the state has power to pass. A lease for smelting lead ore, and fixing the price at which the lessee shall sell the ore dug or lead manufactured, is within the law. *United States v. Gratiot*,* 1 McL., 454.

§ 12. Under the act of congress of March 3, 1807, authorizing the president to lease lead mines, a contract for one year, purporting to be a license for smelting lead ore, and which is for the possession of land, reserving as rent six pounds of every hundred pounds of lead, is a lease and a contract within the power of the president. *United States v. Gratiot*,* 14 Pet., 526.

§ 13. A parol partition of a mining claim, and segregation of the interests of the parties, executed and followed by exclusive possession in pursuance of such partition, is valid. *Mining Co. v. Bullion Mining Co.*,* 3 Saw., 634.

§ 14. Contract construed.—Where two companies have entered into a compromise agreement, and fixed a boundary line, one company to have all the mining grounds to the southeast, and the other all northwest of that line, the parties agreeing to convey to each other respectively such mining grounds lying to the southeast and northwest of said line with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same, such dividing line must be extended along the dip of the vein or lode, so far as that goes, and necessarily divides all that the location on the surface carries. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 4 Saw., 802 (§§ 139-41).

§ 15. Sale of land, with right to dig mineral.—Where one owning a large tract of land grants, bargains and sells part of it, and for himself, his heirs, executors and administrators, covenants with the grantee, his heirs and assigns, that he and they may dig, take and carry away all iron ore to be found within the ungranted part of the tract, paying so much per ton, this is not a grant of the ore, but a right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised. The right is without stint, but it is not exclusive of the owner of the soil; it is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil. *Grubb v. Bayard*, 2 Wall. Jr., 81.

§ 16. Sale of right to work a mine.—In 1788 the Fox Indians sold to D. a permit to work at a mine in their territory "as long as he should please;" and also sold and abandoned to him "all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian should make any pretension to it without the consent of D." *Held*, that this grant was not a complete title, making the land private property, but a mere grant of a mining privilege; 1st, because the terms used being ambiguous, there were no extrinsic circumstances to show that the Indians intended to sell anything more than a privilege; 2d, although the Indians had a right of occupancy, they could not part with the right, except in the mode pointed out by the Spanish laws, and these laws did not sanction such a grant as that to D. *Chouteau v. Molony*, 16 How., 203.

§ 17. In California.—Mines of the precious metals in California belong to the eminent domain of the political sovereignty, as well by the laws of Spain as by the common law of England and the public law of the United States. Land Patents in California,* 7 Op. Att'y Gen'l, 686.

§ 18. Cutting timber.—Under the act of May 10, 1872 (section 2819, Revised Statutes), one who occupies mining ground on the public land is not bound to purchase, but until he does so, he has a mere license to mine it, and a qualified right to timber thereon, but only to such an extent as will enable him to mine the same conveniently. Thus where a party occupied seventy acres, and cut four acres of timber before he began mining operations, and sold the same for his own benefit, assigning, as reason therefor, that by cutting the timber off first, the stumps would rot and be more easily removed when he should be ready to commence mining operations, *held*, that such cutting was unlawful as not being necessary to the mining operations. *United States v. Nelson*, 5 Saw., 68.

§ 19. Mining companies and partnerships.—Mining partnerships are governed by many of the rules relating to ordinary partnerships, but also by some peculiar to themselves, one of which is that one person may convey his interest in the mine and business without dissolving the partnership. If the relations of the plaintiff to his associates cannot be considered as one of a mining partnership, he is still entitled to an accounting from them, if he was a joint owner with them in the mine. The finding by the judge that there is no co-tenancy in the mine, as entitled the plaintiff to an account, is not a sufficient finding of a fact on which to base a decree. *Kahn v. Smelting Co.*,* 12 Otto, 641.

§ 20. Where a mining partnership arises out of a community of ownership in the mines, rather than any agreement to engage in the business of mining, the remaining members of the firm have no right of pre-emption as to the interests of retiring partners in the mines. Thus where miners were tenants in common as to the ownership of the mine, but partners in the

working of it, and A. and B., two of the partners, entered into an agreement to negotiate for the purchase, for their joint benefit, of the interest of certain partners about to retire, but A., disregarding this agreement, clandestinely purchased such interest jointly with C., another partner, *held*, that B. could claim no benefit in the purchase, although he was ready and willing to pay his share of the purchase money. *First Nat. Bank v. Bissell*, 4 Fed. R., 604; 2 McC., 73.

§ 21. Where an unincorporated association of individuals become the grantees of a mine and the surrounding land, and the mine is worked by them in the ordinary manner as mines are worked by mining partnerships in California, the various members must be considered as tenants in common both of the mine and land. *Santa Clara Mining Association v. Quicksilver Mining Co.*, 8 Saw., 330.

§ 22. Where upon bill filed to wind up the affairs of a mining partnership, on account of the impracticability of bringing all the members of the association before the court, some are omitted from the bill, and the association is dissolved by the decree, and its mines and lands are sold in accordance therewith, such decree and sale will not affect the interests in such mines and lands of those partners omitted from the bill. *Ibid*.

§ 23. A corporation carrying on the business of mining is liable for torts, and since it can act by means of agents or servants only, it is liable for the tortious acts of such agents or servants. *Kieley v. Belcher Silver Mining Co.*,* 1 Law & Eq. Rep., 13.

§ 24. Where a workman employed in a mine was injured by blasting carried on in the mine by miners, whose duty it was to excavate and blast, *held*, that the mining company was liable for the injury on the principle that the employment of the injured laborer and the miners who conducted the blasting was not a common employment, since they were employed in different departments, had no authority over each other, nor any opportunity of observing or influencing each others conduct. *Ibid*.

§ 25. An association between parties, who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. *Johnstone v. Robinson*,* 8 McC., 42.

§ 26. Trespass.—An injunction is allowed in all cases of trespass upon mines, on the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property. *Chapman v. Toy Long*,* 4 Saw., 28.

§ 27. Prior to the passage of the acts of congress concerning the mineral lands (chap. 6, tit. 82, R. S.), strictly speaking, all persons who occupied them for the purpose of mining were trespassers, at least as against the United States, but as between the first occupants and third persons, the courts held that the former were not trespassers, and were entitled to the protection of the law as persons in possession of portions of the public domain, with the assumed assent of the owner. Under the mining laws of the United States now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate the minerals therein, is the assignee of the United States, so long as the law remains in force, and he complies with the conditions imposed by it. Until congress withdraws this license by a repeal of the law his right is complete, and he need not take any steps to purchase the land or obtain a patent for it. *Ibid*.

§ 28. The license contained in section 2319 of the Revised Statutes confines the right to explore, occupy and purchase mining lands to citizens of the United States, and those who have declared their intention to become such. When there was no legislation upon the subject, the assumption that the occupant was in possession with the consent of the United States, applied to aliens as well as citizens, and Chinamen as others. But since the passage of those acts there can be no such presumption as to aliens. *Query*, whether the provisions of Poorman creek and the constitution of Oregon (sec. 8, art. XV), forbidding Chinamen from working in a mining claim for themselves or others, are in conflict with article VI of the treaty with China, of July 28, 1868 (U. S. Pub. Treat., 148), providing that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions, in respect to travel or residence "within the country of the other," as may there be enjoyed by the citizens or subjects of the most favored nation. *Ibid*.

§ 29. Plaintiff and defendant were lessees of adjoining collieries under a common landlord. The workings of the collieries had been joined by the trespasses of a prior lessee of the mine, in possession of plaintiff, across the line of his lease and upon the colliery of the defendant, so that water flowed from defendant's mine to the plaintiff's. In suit for damages by plaintiff, the court charged the jury that the defendant was responsible. (1) For such of the drainage upon plaintiff's colliery as was caused by the use of artificial contrivances which would not have been resorted to by the defendant in the course of good and skillful mining. (2) For all overflow of water into plaintiff's colliery, whether surface water or not, which, if defendant's pumping capacity had been sufficient for the requirements of skillful mining, would have been

removed by him without injury to the plaintiff. (3) For such of defendant's drainage as he artificially conveyed from one part of his colliery to another, and thence permitted to escape upon the plaintiff's colliery, as to which water the defendant is not exempted from responsibility by any inadequate effort or insufficient means which he may have taken to prevent the result. (4) The measure of damages is the loss sustained by the plaintiff through the defendant's wrongful acts, including loss of the legitimate earnings of his business as a coal operator during the period in question, of which the jury should find he had been directly deprived by the wrongful acts of defendant. *Prevost v. Gorrell*, * 5 Week. N. of Cas., 149.

§ 80. In an action by the United States for trespass in digging and carrying away a large amount of lead from the lands of the United States, the value of the ore after it is dug is not the measure of damages, but the injury done to the soil by the trespass. The digging and carrying away by the same person is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass. Neither is the rate at which leases are made for these lands a proper criterion of damages. *United States v. Magoon*, * 8 McL., 171.

§ 81. The working of a mine of precious metals is taking away the substance of the estate, and in case of disputed title an injunction will be granted to stay the working of the mine until the title shall be determined, whenever there is danger of irreparable waste or injury. *United States v. Parrott*, 1 McAl., 271.

II. TITLE TO MINES AND MINERAL LANDS.

SUMMARY — *Bill to set aside a patent, § 32. — Limitations; color of title; presumptions, § 33.*

§ 32. A bill alleges that between July 26, 1866, and October 27, 1867, the grantors of complainant, without stating who they are, or the particulars of their acts, in pursuance of the act of Congress of July 26, 1866, and the customs of miners of the district, located and claimed a large number of tin mines, in the county of San Bernardino in California, and worked them in such manner as to secure the several claims, and entitle them to patents, the lands being at the time unsurveyed lands of the United States; that in 1846, Governor Pio Pico granted to the grantor of the defendant eleven leagues of land in what is now San Diego county; that said grantor entered on the land, etc., and on October, 27, 1867, the president of the United States issued a patent to her, said patent referring to a survey annexed, etc., and that it covers the location of the complainant's tin mines. The bill alleges fraud in the survey; that location was not within the grant, etc. *Held*, that the proceeding for locating the grant was, under the decree of confirmation, pending between the United States and the claimant under the grant, when the act of congress of 1866 was passed, and the mining claims were located, and the genuineness of the grant and its location are *res adjudicata* between the United States and the patentee; and that the complainant deriving whatever rights he has from the United States, one of the parties, subsequent to the institution of the proceedings for confirmation, is concluded by the determination. The complainant has no apparent title from the United States. Neither he nor his grantor have tendered the purchase money or applied for a patent. The United States is the party injured, if anybody, and has the right to vacate the patent for fraud, if any right exists. Demurrer to bill sustained and bill dismissed. *Manning v. San Jacinto Tin Co.*, §§ 34-39.

§ 33. A purchaser of a mining claim in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitations will ripen into a perfect right, and he can maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property. If the deed to the purchaser does not give the boundaries of the claim, it cannot extend the possession of such purchaser beyond the parts actually occupied by him, but if reference is made to a location certificate of record, which contains a full and definite description of the claim, such description is by reference incorporated in the deed. It matters not that the location certificate is not shown to be regular in all respects. *Harris v. Equator Mining & Smelting Co.*, §§ 40-42.

MANNING v. SAN JACINTO TIN COMPANY.

(Circuit Court for California: 7 Sawyer, 418-433. 1882.)

STATEMENT OF FACTS.— Bill to set aside a patent for a tract of land containing tin mines. It alleges, in substance, that the grantors of complainant, in 1866 and 1867, located certain tin mines in the county of San Bernardino; that they worked the said mines, and made large expenditures of money, etc., and that the lands were unsurveyed public lands; that in 1846 Governor Pio Pico granted a tract of land to Maria del Rosario Estudillo de Aguirre, located within certain boundaries, and that said Maria entered upon said land, erected a house, and lived there to the present time; that in 1867 the United States issued a patent to said Maria for said land, etc. It is then alleged that the land described in the patent is not the Pio Pico grant, but that the plat was made up in the surveyor-general's office with the fraudulent intent to embrace and secure the tin mines in question. The bill charges various irregularities in the issue of the patent, and a fraudulent conspiracy among various citizens and officers of the land department, for the purpose of locating the grant beyond the limits of the original grant, and so as to secure the tin mines. Further facts are stated in the opinion.

Opinion by SAWYER, J.

The patent described in the bill was issued upon a Mexican grant made in 1846, after confirmation by the board of land commissioners, affirmed by the United States courts on appeal in pursuance of the act of congress of March 3, 1851, "to settle private land claims in the state of California." 9 Stat., 631.

§ 34. *Effect of a patent issued upon a confirmation of a Mexican grant. Cases cited.*

The effect of a patent issued upon such confirmation of a Mexican grant of the kind has been settled by the supreme court of the United States, as well as by numerous decisions of the supreme court of California. In *Beard v. Federy*, 3 Wall., 491, the supreme court of the United States states the effect of such a patent in the following language: "In the first place the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant, as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed by the action of its tribunals

and officers that a claim asserted is valid and entitled to recognition, the government acts and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and correctly located now so as to embrace the premises as they are surveyed and described.*

"As against the government *this record*, so long as it remains unvacated, *is conclusive.* And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent, as a record of the government, that its security and protection chiefly lie. If parties asserting interests in lands, *acquired since the acquisition of the country, could deny and controvert this record*, and compel the patentee in every suit for his land to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, *the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor.* The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. *The intruder resting solely upon his possession might insist that the original claim was invalid, or was not properly located, and therefore he could not be disturbed by the patentee.* No construction which will lead to such results can be given to the fifteenth section. The term '*third persons*,' as there used, *does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.*"

In *Teschemaker v. Thompson*, 18 Cal., 26, the supreme court of California, by Chief Justice Field, says: "This instrument (the patent) is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty, and that the grant was located, or might have been located, by the former government, *and is correctly located by the new government so as to embrace the premises as they are surveyed and described.* Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by TITLE SUBSEQUENT." But, "as the record of the government of the existence and validity of the grant, it establishes the title of the patentee from the date of the grant." In this case that would be from 1846.

And again: "The '*third parties*,' against whose interest the action of the government and patent are not conclusive, under the fifteenth section of the act of March 3, 1851 — *are those whose title accrued before the duty of the government and its rights under the treaty attached.*" This view was established in *Leese v. Clark*, 20 Cal., 412, 420, 423, and repeated in numerous other cases. See *Bissell v. Henshaw*, and cases cited; 1 Saw., 565, and 18 Wall., 268.

In *Carpentier v. Montgomery*, 12 Wall., 495, the court says that the provis-

ion of the fifteenth section of the act of congress cited "was intended to save the rights of third persons not parties to the *proceeding who might have Spanish or Mexican claims*, independent of or superior to that presented by the claimant, or to the *equitable* rights of other parties having *rightful claims under the title confirmed*."

§ 35. *The genuineness of a Mexican grant and its location are res adjudicata on the issuing of a patent.*

The complainant has no pretense of a claim under any Spanish or Mexican grant to any part of the premises covered by the patent. His rights, whatever they may be, are alleged to have accrued under the act of congress of 1866, and consequently, subsequently to that date. The patent is founded on a Mexican grant made in 1846, and its validity is not even questioned. The claim must have been presented for confirmation on or before March 3, 1853, as that was the latest date on which it could have been presented under the act of congress (9 Stat. 633, sec. 13). It was, in fact, confirmed, and the decree of confirmation affirmed by the United States supreme court as early as the December term, 1863. *United States v. D'Aguirre*, 1 Wall., 311. The title was therefore settled, and it only remained to locate the grant long before the rights of complainant had their inception. The proceeding for locating the grant was, under the decree of confirmation, pending between the United States and the claimant under the grant when the act of congress of 1866 was passed, and the mining claims were located, and the genuineness of the grant and its location are *res adjudicata* under the authorities cited, between the United States and the patentee; and the adjudication is that the grant is "correctly located," as well as valid (cases before cited). The complainant deriving whatever rights he has from the United States, one of the parties, subsequent to the institution of the proceedings for confirmation, is concluded by the determination. Besides the grant must have been located either under the act of 1860, or the act of 1864. In either case, the proceedings for location were in the nature of proceedings *in rem*.

§ 36. *Failure of complainant to object or appeal.*

The complainant or his grantor could, under the statute, and should have objected to the survey and location, and upon a decision against him, have appealed to the commissioner of the general land-office, and, if the decision was not satisfactory, to the secretary of the interior. He alleges that he did not file objections, but that parties other than himself or his grantors did, and alleged the very grounds now relied upon against the location, which were overruled.

Nor does it appear that even they appealed. The complainant, then, has no standing to impeach the record on the ground of having a prior Spanish grant. His rights are subsequent and subject to the grant as located; he is equally without standing on the other ground; he alleges no "equitable rights," or "rightful claim under the title confirmed;" he does not claim any interest under the Mexican grant confirmed and patented; or that the patent was issued to the wrong party; he claims that the grant, though valid, and confirmed to the rightful party, was improperly located. He does not, therefore, bring himself within the classes of trusts protected in *Estrada v. Murphy*, 19 Cal., 272, and *Wilson v. Castro*, 31 id., 420, or in any other case cited.

§ 37. *A claimant of mining lands, by virtue of a location under the act of 1866, has no standing to impeach a patent issued on a prior Mexican grant.*

But complainant has no standing to impeach the transaction on another

ground. He has no apparent title from the United States. His right, whatever it may be, is at best, only inchoate. It is a mere privilege; a first right to purchase, or pre-emption right under the acts of congress, of which he may avail himself or not, as he chooses, if he should succeed in vacating the patent. He is not bound to purchase of the government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better position, as regards title in his relation to the government, than the parties in *Hutton v. Frisbie*, 37 Cal., 481, and *Frisbie v. Whitney*, 9 Wall., 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. *Doll v. Meader*, 16 Cal., 295. The United States, if anybody, is the party injured; and the right to vacate the patent for fraud, if any such right exists, is in the United States; and the United States should file the bill to vacate the patent. *Moore v. Robbins*, 96 U. S., 533. Justice can only be done, if at all, upon a bill filed by the United States — the party to the transaction, and the party injured. It is not claimed that the grant confirmed and patented is not valid and properly confirmed; but it is said it is improperly located. The patentee, then, is entitled to eleven leagues of land somewhere. Even upon a bill filed by the government, if the location should be vacated on the ground of frauds, practiced by the officers in locating it, with or without the knowledge of the patentee, it is at least doubtful if it could be relocated in the proper place. The ordinary courts have no jurisdiction in the location of grants, except in the mode prescribed by the special act of congress on the subject. But suppose *the complainant* should succeed in charging the defendant, as a trustee, on account of fraudulent acts occurring *before he had any interest in the matter*, and obtained a decree for conveyance of the whole, or a part of the land, there could be no relocation on other lands, for the patent is not vacated, and the proceedings between the patentee and the United States are conclusive. The grantee has got the full amount of land called for in her grant, and she, or her grantee, has been compelled by the court to convey it to a party who has, and claims, no interest in the grant, legal or equitable. If the complainant can thus obtain a conveyance of a large part of the grant, under similar circumstances, the whole can be taken, and the grantee, under the Mexican grant, would be left without any land, although adjudged to be entitled to eleven leagues. The court cannot do equity on a bill filed by the complainant alone, even if it can in any case. The complainant does not even offer to pay either the patentee or the government for the land. He proposes to take it under a decree of the court, so far as any offer is concerned, without payment of even the small sum required by the statute.

§ 38. — *the United States is the proper party to impeach such patent on the ground of fraud.*

The United States is no party to the bill, and would not be affected by the decree. Clearly the United States is the proper party, and the only proper party, to a suit upon the facts set out in this bill. No decree could be rendered against the defendant in a suit by any other party which could do it justice, or protect and preserve its rights under the Mexican grant, confirmed and patented. The fraud charged, if it exists, certainly deserves the severest punishment, but the law does not punish it in that way. In my judgment, the case does not fall within the principle announced in *Johnson v. Towsley*,

13 Wall., 72, and followed in subsequent cases of a like character. *United States v. Flint*, 4 Saw., 74. The complainant, in my opinion, is not in a position to maintain this bill. The genuineness of the grant and its "*correct location*" were the very questions in issue and determined in the proceedings for confirmation and segregation under the acts of congress, and these questions cannot be re-examined in other tribunals, even upon a bill filed by the United States, as was held in *United States v. Flint*; *United States v. Throckmorton*; and *United States v. Carpentier*, 4 Saw., 42, affirmed in 98 U. S., 61. In *United States v. Flint*, I had occasion to observe that "it is a startling proposition to those who hold patents to lands, issued upon confirmed Spanish or Mexican grants, that after twenty-five years of compulsory litigation, intended in the language of the various acts of congress, to 'settle titles to land in the state of California,' the holders of all such patents are liable to be called upon to relitigate their claims with the government in the ordinary courts of justice; and that the patent, instead of being conclusive evidence of a 'settlement' of the title—the end of litigation—is but the foundation for the beginning of a new contest to unsettle it, in the tribunals of the country, *which before had no jurisdiction whatever over the subject matter*. The very institution of these suits in the name, and by the authority of the government, was well calculated to produce, and undoubtedly did produce, a general distrust of such titles, and a wide-spread, if not a well-founded alarm." *Id.*, 85-6. It is a still more "startling proposition," that any citizen, at his own option, thirteen years after a claim for confirmation of a Mexican grant has been presented to the proper tribunals of the country, and nearly three years after the decree of confirmation has been affirmed by the supreme court of the United States, and pending the survey and final location, and during the ordinary delays incident to issuing a patent, can, by a mere entry or trespass upon the lands so claimed, and in litigation between the government and the claimant, *acquire a status* that will enable him to attack and avoid the whole proceedings, and for his own benefit control the title vested by the patent under the grant, in which grant he has no interest.

In this case there is no attack on the genuineness of the grant. It is only the location of the grant that is assailed. Upon the inviolability of the location, Mr. Justice Field, with the concurrence of the circuit and district judges, in *United States v. Flint*, 4 Saw., 61, said: "As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided, by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do; that belongs to a department whose action is not the subject of review by the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey, when in a controversy between parties, it is alleged that the survey made infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey, or change that already made." This was said in a case where the United States was complainant in the bill. *A fortiori*, must this be true as to a party having the *status* of the complainant in this bill. In the conclusions stated by Hoffman, Judge, in *United States v. Flint*, 4 Saw., 84, 85, and especially in 1, 2, 3 and 6, I fully concur. (See also pages 86, 87.) The government, to carry out the provis-

ions of the treaty, committed this whole matter to other and special tribunals, except so far as brought before the ordinary courts for review or appeal. The circuit courts in the exercise of their general and ordinary jurisdiction had nothing to do with it. If this location is declared void in this proceeding, and the defendant be decreed to convey to the complainant, the court has no power to relocate the grant, or reinand the case to any other court, board, or officer to relocate it; and although the *government* is satisfied with the location, the grantee of a genuine Mexican grant of eleven leagues will lose the land granted. The proceedings for confirmation and location of the grant, having resulted in a patent after a fourteen years' litigation, all the tribunals and officers to whom the special jurisdiction over the matter was committed, have become *functi officio*.

If this court should now assume jurisdiction to vacate the location, it cannot do equity by giving other lands in place of those taken away. Besides, in the mean time, relying upon this location, other parties may have acquired from the government the title to all other lands upon which it might be located. These patents ought not to be lightly interfered with at the will or caprice of parties entering upon lands, claimed under Mexican grants, pending proceedings for confirmation and location, and setting up *recent claims* under general pre-emption laws, or laws authorizing the location and purchase of mines. Whether this case has any feature that brings it within any of the exceptions stated in the last cases cited, it will be time enough to determine when the United states files a bill to vacate the patent on the ground of the frauds charged. In my opinion, the bill presents no ground for equitable relief.

§ 39. *Complainant is barred by lapse of time. Question of fraud.*

So, also, in my judgment, the suit in analogy to the statute of limitations of the state, is barred by lapse of time. If complainant is entitled to any relief, it is wholly on the ground of fraud. Such suits are barred within three years. (Code Civ. Proc., sec. 338, clause 4.) According to the allegations of the bill, the fraud was consummated October 27, 1867. The bill was filed September 8, 1880, nearly thirteen years afterwards. The statutory period had, therefore, run more than four times before the filing of the bill, unless the case is within the provision that the cause of action shall "not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." It is attempted to take the case out of the statute by the simple averment: "That your orator never heard of the various actings and doings hereinbefore in articles XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX of this bill set forth, or any of them, until within two years last past." No reason is given for not discovering the fraud. There certainly should be some showing on this point, in view of the public and notorious acts alleged. The bill is singularly barren of allegations of specific facts, though amply full as to general charges of facts and legal conclusions *on information and belief*. The complainant does not state who his grantor is, or who any one of the other locators of some four hundred mining claims, described as belonging to him, is, nor when they, or any of them, were conveyed to him or his grantor, except that they were conveyed to his grantor before October 27, 1867, and to himself after that date. He mentions no date except the date of the act of congress of 1866, the date of the Mexican grant of 1846, and of the patent October 27, 1867. No date of any of the deeds, act of incorporation or other transactions since October 27, 1867, are given to enable the court to determine from the facts whether he ought to have discovered the

frauds charged at an earlier date than alleged. For aught that appears, he may have received his conveyance from his grantor the day before he commenced his suit, or he may have received it as early as October 28, 1867. It is not even distinctly averred that his immediate grantor was not fully informed of the acts of fraud, though it appears inferentially in article XII as a reason for not applying for a patent. But there is no averment at all as to the knowledge of the other parties who must have located the numerous mining claims, and, for aught that appears, might have conveyed to his grantor on the day before the issue of the patent, and with full knowledge of the frauds charged.

The great and substantial facts in the case are all facts of public record, and public proceedings under the law, and of public notoriety. The survey and the patent are of record, and open to everybody's inspection and examination. The incorporation of the defendant is a matter of public record. Notice of the survey appears from the allegations of the bill to have been published under the statute, and to have produced its proper results, as the bill shows upon its face, that parties other than complainant's grantor actually appeared in the surveyor-general's office, as provided by statute, and filed therein objections to the survey on the very fundamental grounds of the frauds stated, and relied on in this bill, and that the objections were overruled. Thus not only the survey and patent, but the very facts charged as the equitable grounds for relief in this bill, were put on the public records of the surveyor-general's office, and ruled upon by that office. The facts charged, and the rulings, therefore, became public records, prior to October 27, 1867, open to the inspection and examination of all; so, also, the fact, if it be a fact, that the grant was located in such a manner that it did not approach within six miles at the nearest point, or within twenty miles of some points of the exterior bounds of the tract within which it could lawfully be located, and did not include the residence of said Maria, or follow the *espediente* or decree, was upon record in the survey and in the patent, and must have been known to complainant and his grantor; for it is alleged that the knowledge of the patent, and belief that it was valid is the reason why they did not apply for patents for their numerous mining claims.

It was therefore known that the patent covered them. And it would appear from the allegations of the bill, inferentially, if not by direct averment, that plaintiff's grantor was for years in possession of his numerous mines with that knowledge. All these are great, notorious and public facts *actually known* to complainant's grantor, and presumptively to all mankind; and they are the fundamental facts of the fraud upon which whatever equity there is in this bill rests. They are such facts as must, necessarily, have put the complainant and his grantor upon inquiry, and have long ago led to the discovery of the frauds. They were facts which they were bound to notice, if they did not do so in fact. They furnish a clue, which, if followed with reasonable diligence, would not require thirteen years to lead to the fraudulent acts of the parties charged. Even now the frauds are not positively alleged, but are cautiously charged upon information and belief; and the defendant is called upon by numerous interrogatories to furnish the proof of the fraud alleged. Certainly the known facts were sufficient to arouse suspicion, and enable the complainant or his grantor to file a bill of *discovery on information and belief long ago*. The location of the grant was in the nature of a proceeding *in rem*, and the party had a right under the statute to file objections, and some act-

ually did, alleging these very frauds now charged. These allegations were, therefore, of public record. Parties cannot disregard known facts that leads to frauds affecting their rights, and in the language of Mr. Justice Bradley, "then claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world *must move on*, and those who claim an interest in persons or things must be charged with knowledge of their *status* and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*." Broderick's Will, 21 Wall., 519 (Est. of Dec., §§ 47-51). It must not be forgotten, not only that the world "moves on," but that in this age and country, and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer in events and progress than twenty years some centuries ago, when the statutes of limitation were adopted in England. Parties cannot lie down to sleep upon their rights, and on waking up many years afterwards find them in the same condition as that in which they were left.

The observations of the chief justice in *Vance v. Burbanks*, 101 U. S., 520, are not inappropriate to this case. Among other things, he says, with reference to the facts of that case: "If any was in fact not sent forward, and Scott did not discover the omission until one year of the time of the commencement of this suit, he must have been grossly neglected of his own interests." The same may be said of the complainant in this case. If the open, known, notorious facts, suggested in the bill, and apparent upon the public records of the county, did not, in fact, put the complainant and his "grantor" upon inquiry, and lead them to a discovery of the frauds charged, at least, sufficiently to afford as good a basis upon which to file a bill of discovery, containing general and sweeping charges, "upon information and belief," as that upon which the present bill rests, they must, indeed, "have been grossly neglectful of their own interests."

In my judgment, upon both grounds discussed, the bill fails to present any grounds for the relief sought, and it is manifest, under the views expressed, that the bill cannot be truthfully so amended as to obviate the objections. The demurrer to the bill is sustained, and the bill dismissed. Let a decree be entered accordingly.

HARRIS v. EQUATOR MINING & SMELTING COMPANY.

(Circuit Court for Colorado: 8 McCrary, 14-19; 8 Federal Reporter, 862-866. 1881.)

Opinion by HALLETT, J.

STATEMENT OF FACTS.—Defendant applied in the land-office at Central City to enter the Charlotte lode; and plaintiffs made adverse claim to a part of the territory as the Ocean Wave, and brought this suit in support of their claim. The claims overlap near the ends, and the area in dispute is not very large. The Ocean Wave is something more than ten years older than the other location, and a tunnel has been run nearly the whole length of the claim. At the trial there was evidence to show that the lode was discovered in the year 1867, and that work had been done in the tunnel from time to time thereafter, until this suit was brought. Very little ore was taken from the tunnel, but several witnesses testified that the lode was well defined and clearly traceable throughout the length of the tunnel. An attempt was made to show a valid location, according to the law in force in 1867, and plaintiffs also relied on a relocation in 1875. In this plaintiffs were not successful, and they were at last forced to

rely on possession only in themselves and their grantors as evidence of title. As to the matter of possession, it was shown that the tunnel was worked from time to time, and by different parties, from the date of discovery, in 1867, until this suit was brought. Some of the parties in possession, and others who were not in possession, had conveyed parts of the claim, or an interest therein, to other parties named; but, as plaintiffs were unable to connect themselves with these conveyances, they were not received. One conveyance made by a master in chancery, under a decree of court in Clear Creek county, was, however, received under the circumstances which will now be stated:

In the year 1875, and for some time prior thereto, the Leavenworth Mountain Mining & Tunnelling Company was in possession of the property, and had done some work in the tunnel. They had erected buildings at the mouth of the tunnel, and appeared to have and hold undisputed possession, but whether, under claim of title was not shown. In this situation of affairs, one James M. Estelle brought suit against that company in the district court of Clear Creek county, and in June, 1876, obtained a decree for the sale of the premises to satisfy several amounts of money in the decree mentioned. The premises were sold under the decree to Estelle and Morrison, and in due time a deed was made to Estelle, Morrison having assigned to him his interest in the purchase.

Several plaintiffs claim by descent, and others by purchase from Estelle; and there was evidence at the trial tending to prove that they, or persons in their interest, were in possession of the Ocean Wave at the time the Charlotte lode was located, in October, 1879. Upon these facts a question was presented at the trial, whether the plaintiffs, not having shown a valid location of the Ocean Wave, could claim anything in virtue of their possession of the ground in controversy, if the jury should find that they held possession at the date of the Charlotte location. And it was conceded that as to the tunnel itself, and the area covered by the buildings of the plaintiffs, at and near the mouth of the tunnel, their right could not be denied. But it was contended that nothing less than a valid location could give to them a possession beyond their actual occupancy to the full extent of a claim one thousand five hundred feet in length by one hundred and fifty feet in width.

§ 40. *Rights of a locator in actual occupancy, who has been evicted by a wrong-doer.*

Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession; not on the ground that the essentials of a valid location are in any case to be omitted, but that in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The statute of limitations, enacted by the state, and recognized in the act of congress, is founded on this principle. If, in this state, the practice in ejectment for mining claims has been to show all the steps of a valid location, in cases of actual occupancy and possession in the

plaintiffs, it has never been declared that such proof is in all such cases indispensable.

§ 41. *The rules applicable to real property apply to mining claims. Title by adverse possession under color of title.*

It is not necessary, however, to discuss the point at length, for it is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but strict compliance with the law regulating locations, but as against other citizens seeking to locate the same ground. It may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which, in time, under the statute of limitations, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property: as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not to the personal representative of his estate; and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it. *Attwood v. Fricot*, 17 Cal., 38; *Hess v. Winder*, 30 Cal., 349.

§ 42. *Matters of record may be incorporated in deeds by reference.*

The deed from the master in chancery to Estelle does not give the boundaries of the claim, without which, according to the authorities cited, it would have no effect to extend the possession of plaintiffs beyond the parts actually occupied by them. But reference is made to a location certificate of record, which contains a full and definite description of the claim, which is the same as if the description had been given in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed.

The charge to the jury, of which defendant complains, was, in substance, that possession of the Ocean Wave by plaintiffs, at the date of the Charlotte location, should extend to the limits defined in the master's deed to Estelle, and would defeat an adverse location during such possession. This, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence. The proposition, as stated, is believed to be correct, and the motion for a new trial will be denied.

§ 43. *Placer mining claims.*—A patent issued since the passage of the act of July 9, 1870, may properly embrace a *placer* mining claim of more than one hundred and sixty acres, and may include all adjoining locations which have been purchased by the patentee; and to obtain such a patent, no other proceedings are necessary than those required when but one location is included in the claim. *Smelting Co. v. Kemp*, 14 Otto, 686.

§ 44. *A defendant in ejectment cannot contest the title to a placer mining claim by putting*

in evidence the proceedings of the land department, to show that the patent was issued upon a single application, and included more locations and acres than was allowed by law. *Ibid.*

§ 45. Mineral land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes. *Steel v. Smelting Co.*, 16 Otto, 447.

§ 46. Under act admitting California.—Congress, by the act of September 9, 1850, admitting the state of California into the Union, did not convey or dedicate the minerals in the public lands either to individuals, the state or the public, but reserved the right to dispose of all the public mineral lands. *United States v. Parrott*, 1 McAl., 271.

§ 47. Grant to California.—By an act of March 3, 1853, congress granted to the state of California sections 16 and 36 in each congressional district, except where settlers had located thereon, in which such settlers acquired title thereto by claiming the right of pre-emption within three months after the return of the plats of the surveyors to the local land-office. Across a portion of one of sections 16 a mining company had constructed a canal for mining purposes. Upon the same portion a settler had located and erected a building. The survey of the lands was completed May 19, 1866. The settler, however, did not claim his pre-emption right, but purchased the land from the state in 1867. In 1866, July 26, congress passed an act recognizing the vested rights of miners, and providing for the protection of the same. This portion of section 16, being claimed by the mining company and also by the settler, *held*, that, no pre-emption right having been claimed by the settler, the title to the land vested in the state at the completion of the survey in 1866, and hence the mining company could have no right therein by the subsequent act of congress, passed in 1866. *Water & Mining Co. v. Bugbey*, 6 Otto, 165.

§ 48. Grant to Nevada.—The act of congress, entitled the Nevada Enabling Act, approved March 21, 1864, provided "that sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto . . . are hereby granted to said state for the support of common schools." At the time of the passage of this act the sections in the several townships had not been surveyed, and prior to such survey parties had settled on mining land embraced within section 16, as appeared by the subsequent survey, and sunk mining shafts at great expense, and in 1874, under the act of congress of July 26, 1866, obtained a patent for such lands from the United States. In 1868 the state issued its patent for a part of the same land in said section 16 to other parties. *Held*, that congress, by the act of 1864, reserved the right to dispose of the mineral lands within the state; that the legislative act of Nevada of February 13, 1867, recognized this right, and that therefore the patent from the United States was a better title than the older patent from the state. *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 8 Otto, 684.

§ 49. Grant of section 16 to Michigan.—According to the compact entered into with the state of Michigan at the time of its admission into the Union, every section numbered 16 in every township of the public lands, and where such section had been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, was granted to the state for the use of schools; and when the lands were surveyed and marked out, the title of the state attached to every section 16, and, if there were no legal impediments, became a legal title. Nor did the act of March 1, 1847 (9 Stats. at Large, 146), providing for the sale of mineral lands, include section 16, or affect the right of the state thereto. Thus, under the operation of this act, and also the act of September, 1850 (9 Stats. at Large, 472), a lease, made in 1845 by the secretary of war of some mineral lands, was held not to confer a right upon the mining company, which was the assignee of the lease, to enter the lands and obtain a patent for section 16, and hold the same as against the state or its patentee. *Cooper v. Roberts*, 18 How., 173.

§ 50. Under a compact with a state to give to it section 16 in every township in the state, unless it shall be otherwise disposed of, congress has the right to reserve all mineral lands; and if section 16 contains mineral land, a section may be given, as provided in the compact, as contiguous to section 16 as may be. The right to a particular tract under the grant does not exist until a survey is made, and if the section should be found to contain minerals, it is appropriated by a general law reserving all such lands before survey; and where a miner, holding a lease to mining land in section 16, has the privilege of purchasing or has purchased from the United States such land, he is entitled to hold the same, notwithstanding a grant of the same land has been previously made by the state to other parties, as the right of the state in such case was not to section 16, but to a section as near to section 16 as practicable. *Cooper v. Roberts*, 6 McL., 93.

§ 51. In California.—Patents granted by the United States for lands confirmed by the commissioners to adjudicate private land claims, do not carry, nor do they reserve any right as to mines, all which remains to be determined by the laws of California. *Land Patents in California*, * 7 Op. Att'y Gen'l, 636.

§ 52. **Diamonds** are included in the terms "valuable mineral deposits," as used in the act of congress of May 10, 1872, chapter 152, and accordingly title to public lands producing diamonds can be acquired by individuals or associations under the provisions of such act. *Mineral Lands*,* 14 Op. Att'y Gen'l, 115.

§ 53. **Deed construed.**—Where, out of a large tract of land, a conveyance is made of a mine thereon with one thousand acres of land "around, circumjacent and adjoining said mine," the land should be located, so far as practicable, so as to leave it in a square form, with the mine in the center; nor is this right of location affected by subsequent conveyances, by the grantor, of the larger tract in two parts to other parties. *Santa Clara Mining Association v. Quicksilver Mining Co.*, 8 Saw., 330.

§ 54. **Deed in evidence.**—A deed of a mining claim, executed and recorded before the passage by the territorial assembly of any act relating to such deeds, cannot be offered in evidence without proof of its due execution by the grantor. *Sullivan v. Hense*,* 2 Colo. T'y, 424.

§ 55. **Conveyance of claims.**—By the law of Utah Territory mining claims are real property, and pass by deed, although the legal title is in the government. *Houtz v. Gisborn*,* 1 Utah T'y, 178.

§ 56. **Transfer of claim.**—In Nevada the actual transfer of the possession of a mining claim, in the early days, with a view of transferring title, followed by a possession under it, acquiesced in, made a valid transfer of a mining claim. The statute of Utah does not apply to mining claims. *Kinney v. Con. Virginia Mining Co.*,* 4 Saw., 382.

§ 57. Where parties both claim under the original locators of a mining claim, the regularity and validity of the claim are not in question. *Mining Co. v. Taylor*,* 10 Otto, 37.

§ 58. A written conveyance is not necessary in Nevada to the transfer of a mining claim. *Ibid.*

§ 59. **Right of purchase under act of 1866.**—The act of congress of July 20, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," gives the right of purchase of a mining claim, to a silver or gold-bearing lode or vein, to the person, or association of persons who, in pursuance of the laws of the state or territory; and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner, and entitled to possession against everybody except the government of the United States. Such a right is in the nature of a pre-emption. *Mining Co. v. Bullion Mining Co.*,* 3 Saw., 634.

§ 60. **Lead mines** are not excepted in the act of congress, May 25, 1824 (4 Stats. at Large, 52), as to confirmation of French and Spanish titles; hence it was proper for a party claiming under such titles lands containing lead mines to establish the validity of his claim according to the provisions of that act. *Delassus v. United States*, 9 Pet., 117.

§ 61. The act of congress of June 26, 1884, creating additional land districts in the states of Illinois, Missouri, and the territory north of the state of Illinois, does not so far repeal the fifth section of the act of March 8, 1807, entitled "an act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," so as to subject lead-mine lands in said districts, created by the act of 1884, to sale as other public lands are sold, or to make them liable to pre-emption by settlers. (*McLean, J.*, dissented.) *United States v. Gear*,* 3 How., 120.

§ 62. **Mines under the Mexican law** may be the subject of rightful ownership, distinct from the land as such for agricultural or other ordinary uses. Mining rights are usually held upon conditions not affecting the title to the lands as derived under the ordinary conveyances, and such rights are terminable when, by their use, the minerals contained in the soil are wholly removed. The ownership of a mine, however, as secured under the mining ordinance by registry and judicial possession, does not consist alone in the right to take from the soil the minerals therein to be found, but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period within the boundaries of the pertenencias appertaining to the mining right or privilege. Such a mine is land within the meaning of the act of congress appointing commissioners to examine claims to land in California (act of congress, March 8, 1851). *United States v. Castillero*,* 2 Black, 17.

§ 63. **Questions concerning mines and mining rights in Mexico** depend, in a great measure, upon the provisions of the ordinance of the 22d of May, 1783, which, although ordained long before her independence by the sovereign of the parent country, is still in force, and constitutes the principal code of the republic upon that subject. That law provides for the presentation of a statement by the discoverer to the mining deputation of the territory, or the nearest one, should there be none there, noting in a book or register, notice, opening of a pit or well in the vein or veins, inspection by one of the deputies, giving possession and measuring to the party his pertenencias, fixing stakes and delivery to the party of an attested copy of the pro-

ceedings. If contestants appear during the time, it becomes the duty of the tribunal to adjudge the right to him who shall make the better proof. *Ibid.*

§ 64. The adjudication or decree of the proper tribunal, and the registry of the adjudication, together with the proceedings upon which it is founded, and not the mere fact of the discovery, vests the title in the applicant, in the case of mines in California, claimed under a Mexican grant. Boundaries must also be fixed to carry the adjudication into effect, or rather to complete it, else the title will be void for uncertainty. *Ibid.*

§ 65. Under the mining ordinance of 1783, relating to mines in Mexico, in districts having no mining court, the court nearest thereto had jurisdiction. On the 2d of December, 1842, a new system was put in force, the fourth article of which constituted and regulated the tribunals of mining. Among other things, it provided for the creation of courts of the first instance. The special decree of January 14, 1843, provided that territorial deputations may continue to exercise their functions "until the courts of first instance are established." The ordinary tribunals, as, for example, an alcalde could take no jurisdiction over mining matters. It may well be inferred that the authorities of the home government had determined to reserve the adjudications of titles to such important public interests to the federal tribunals. (CATRON, WAYNE and GRIER, J. J., dissented.) *Ibid.*

§ 66. Grants of lands under the Mexican law to one "as a colonist" convey no interest in the minerals. *Ibid.*

§ 67. Mexican grant.—A., holding a grant of land from the Mexican government, containing a quicksilver mine, granted the mine, together with one thousand acres surrounding the mine, to B. B. took possession and he and his grantees continued to work the mine for twenty-five years. A. subsequently granted the same mine and land to C., which grant, upon application, was confirmed to C.'s grantees, to whom a patent was accordingly issued. *Held*, that the title derived through the first conveyance was the better one, and that the legal title under the patent to the grantees of C. must be controlled for the benefit of the grantees of B. *Santa Clara Mining Association v. Quicksilver Mining Co.*, 8 Saw., 380.

III. LOCATION OF MINING CLAIMS.

SUMMARY—*Work on location; property right in mining claim; what necessary to a location,*

§ 68.—*Length and width of claim; rules, regulations and customs of miners*, § 69.—*Location before discovery of vein or lode; right to lodes or veins within limits of location; lode defined*, §§ 70, 71.—*Mining claim defined*, § 71.—*Mineral in place*, § 72.—*First discoverer*, § 73.—*Obliteration of marks, etc.*, § 74.—*Marking location*, § 75.—*Recording*, §§ 76, 77.—*Work on location*, §§ 78-83.—*Forfeiture; relocation*, §§ 81, 82.—*Notice*, §§ 84, 85.—*Application for patent; objections; relocation; intervening claimants*, § 86.—*Rights of aliens*, §§ 87, 88.—*Possession*, § 89.—*Lines*, §§ 90, 91.—*Intruders*, §§ 92, 93.

§ 68. In July or August, 1864, George O. Humphreys and William Allison located a mining claim. This location was valid and subsisting on May 10, 1872, and no adverse claim then existed. No work was done between that date and June, 1875, when, before any relocation, the original locators or their grantees resumed work upon the claims, and did enough to re-establish their original rights, if that could be done at the time by a simple resumption of work. On the 19th day of December, 1876, Belk made a relocation, under which he now claims, and did what was necessary to perfect his rights, if the premises were then open for that purpose. On the 21st of February, the defendants entered and made another relocation, doing what was necessary to perfect their rights, if the premises were then open to them. Belk brought ejectment. *Held*, that under the act of May 10, 1872, chapter 152 (17 Stat., 91), the act of March 1, 1873, chapter 214 (17 Stat., 483), and the act of June 6, 1874, chapter 220 (18 Stat., 61), the law stood as it would have stood had the act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before January 1, 1875; that the exclusive possessory rights of the original locator and his assigns continued, without any work, till that time, and afterwards if, before another entered and relocated the claim, he resumed work as required by law. The law fixes no time within the year when work must be done, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until December 31, 1876, and the work, if completed on that day, would be just as effectual for the protection of the claim as if done on the 1st of January previous. It follows that the owners of the original location, on the 19th of December, 1876, had the exclusive right to the possession and enjoyment of the property in dispute. A mining claim, perfected under the law, is property, which may be bought, sold and conveyed, and will pass by descent. Actual possession is no more necessary for the protection of the title acquired to such a claim by a valid location than

for any other grant from the United States. The attempted location by Belk in December is not operative on the 1st of January. The right to the possession comes only from a valid location. A location is not made by taking possession alone, but by working, recording, and doing whatever is necessary under the acts of congress, and the local laws and regulations. Whether in Montana, under the statute of limitations, an action could be maintained against Belk or not by the original locators or their grantees, his right of location depended entirely on the act of congress, and, under it, what he did had no effect to secure to him the grant of any rights. The defendants, having got into possession and perfected a relocation, have secured a better right. *Belk v. Meagher*. §§ 94-99.

§ 69. The statute of May 10, 1872, authorizes a claim to be one thousand five hundred feet in length along the vein or lode, and no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface. By implication, the miners by a rule, regulation or custom may limit the width of a claim to twenty-five feet on each side of the middle of the vein, but such limitation to be valid must be by virtue of a rule, regulation, or custom, which has not only been established, but which is actually in force at the time of the location. As held by the supreme court of California under the state statute such regulation does not, like a statute, acquire validity by the mere enactment. It is void whenever it falls into disuse, or is generally disregarded. It is a question of fact for the jury whether the mining law is in force at any given time; but being once in force, a presumption arises that it continued in force till something appears showing that it had been repealed or fallen into disuse, and another practice generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. A location exceeding the width limited by the mining law is void only as to the excess. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119; *Jupiter Mining Co. v. Bodie Con. Mining Co.*, §§ 120-132.

§ 70. No rights can be acquired by a location made before the discovery of a vein or lode within the limits of the claim located. But if a party makes a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim. And when he has made a location of a mining claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled not only to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines, extended vertically downwards, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other rock in place, carrying valuable mineral deposits. It may be very thin, and it may be thick or thin in places, and in others widening out, in places quite barren, in others immensely rich. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119; *Jupiter Mining Co. v. Bodie Con. M. Co.*, §§ 120-132.

§ 71. A "mining claim" is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must be located, under the act of congress of 1872 (R. S., sec. 2320), upon at least one known vein or lode, but the vein or lode is not the whole claim. It includes the exclusive right and enjoyment of all the surface within the lines of the location. *Mount Diablo Mill, etc., Co. v. Callison*, §§ 133-138.

§ 72. It is not essential to the validity of a discovery that the mineral-bearing rock shall be found in place. If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law in Colorado allows the discoverer sixty days from the date of his discovery for showing the vein or body of mineral-bearing rock to be in place at a depth of ten feet or more from the surface. *Erhardt v. Boaro*, §§ 145-147.

§ 73. It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him and claimed by him in order to give validity to the location. *Jupiter Mining Co. v. Bodie Con. Mining Co.*, §§ 120-132.

§ 74. When a mining claim is once sufficiently marked out upon the ground, and necessary acts of location performed, the right of possession in the locator cannot be divested by the obliteration of the marks, or removal of the stakes, without the fault of the locator, so long as he continues to perform the necessary work upon the ground, and to comply with the law in other respects. *Ibid.*

§ 75. To make a valid location of a mining claim it is required that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice, showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law. A subsequent locator cannot object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119; *Jupiter Mining Co. v. Bodie Con. M. Co.*, §§ 120-132.

§ 76. If a rule or custom exists in a district to record a mining claim, it is only necessary to record at the place where the custom known and in force at the time of the location required the record to be made. The custom to record, and the place of record, to be binding, ought to be so well known, understood and recognized in the district, that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location. The language of the act of congress, authorizing miners to make regulations "governing the location and manner of recording . . . mining claims," implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location or one of the acts necessary to constitute a location. Independent of the question of forfeiture, by an otherwise valid location of a mining claim, a person may have acquired the exclusive right of possession and enjoyment of such claim, at least as against other parties having actual notice of the claim, its position and extent, before recording such location, where the custom does not make recording an act of location. Assuming that the miners have authority to make a regulation or law by which a mining claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim. The object of recording mining claims is to give notice to others desiring to locate claims in the vicinity. The congressional law does not require a record, but prescribes what a record shall contain where it is required by the local rules. *Jupiter Mining Co. v. Bodie Con. Mining Co.*, §§ 120-132.

§ 77. There was testimony tending to show that the rule and custom of miners in Bodie district, California, required mining claims to be recorded. If such was the rule or custom in force at the time, a record was necessary; otherwise not. To make a valid record it was necessary for it to contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim. Such natural objects or permanent monuments are not required to be on the ground located, although they may be. The natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If the reference to the natural and permanent monuments mentioned identify the claims with reasonable certainty, the records are sufficient and valid; otherwise insufficient. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119; *Jupiter Mining Co. v. Bodie Con. Mining Co.*, §§ 120-132.

§ 78. When one person or company owns several contiguous or adjoining claims, capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts and tunnels therefrom, and such work need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims or of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself. *Jupiter Mining Co. v. Bodie Con. M. Co.*, §§ 120-132.

§ 79. The act of congress of January 22, 1880, amending the mining law, fixes the time of the commencement of the period for the annual work on all claims located since May 10, 1872, at the 1st of January next succeeding the date of location. It does not act retrospectively. *Slavonian Mining Co. v. Vacavich*, §§ 142-144.

§ 80. Resumption of work must be actual, or else there must be a *bona fide* attempt to resume. Threats not made on the ground, or so near as to amount to the same thing, cannot justify a party in declining to make some effort to work, and words, accompanied by any overt act, showing a present intention of carrying them into effect, even on the ground, can hardly do so. *Ibid.*

§ 81. A relocation before the forfeiture of a claim by the original locator is a premature

location, and is not validated after forfeiture by failure on the part of said original locator to do annual work. But after a forfeiture, the original locator cannot put himself in a position to maintain ejectment, except by actually resuming work before an entry by the person seeking to relocate for the forfeiture, and an ouster by such person. Such person seeking to relocate, finding no one on the ground, has a right to take possession after a forfeiture, and the original locator cannot enter on the mining ground, while in the possession of another, after such forfeiture. *Ibid.*

§ 82. One hundred dollars in value of work must be done on a mining claim, located since May 10, 1872, in each year, to hold it; and in default of such work, the claim may be relocated by other parties, provided the first locator has not resumed work. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves the claim. The statute nowhere authorizes a person to trespass upon or relocate a claim, however derelict the first locator may have been, provided he resumes work before the second locator enters. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119; *Jupiter Mining Co. v. Bodie Con. M. Co.*, §§ 120-132.

§ 83. Work on a claim is work done any where within the lines upon the surface, and any where within those lines below the surface, when they are carried down vertically. If an outside lode dip into the claim, the work may be done inside of that lode, but at the same time on the claim. Work done outside of the claim or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be found well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it. *Mount Diablo Mill, etc., Co. v. Callison*, §§ 133-138.

§ 84. A mining law provides that the locator or locators of any ledge or lode shall be entitled to hold one hundred feet on each side of said ledge or lode, with all minerals therein contained. Under this law it was held that when a person became a locator by putting up his stake or mound, and his notice of the number of feet claimed on the lode, etc., he is invested with a right to hold one hundred feet on each side of the lode located. Where such locator by such notice states the number of feet he claims along the lode, and claims all the privileges granted by the law of the district, and those laws entitle him to hold one hundred feet on each side of his lode, then the length and breadth of his claim are fixed with reasonable certainty, because, by reading the laws of the district, with the notice referring to them, the subsequent locator can make certain the exact thing claimed. *Ibid.*

§ 85. If the notice posted at the point of discovery of a mining claim contains no description of territory, or the number of feet claimed on each side of, or in any direction from, said discovery, it cannot have an extent beyond what is necessary to sink a shaft. *Erhardt v. Boaro*, §§ 145-147.

§ 86. It seems that under the act of 1872, when one is seeking a patent for his mining location, and gives proper notice of the fact as prescribed, any other claimant of an unpatented location must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase, the doctrine cannot be applied so as to cut off the rights of the earlier patentee, under a later location, where no opposition to that location was made under the statute; the silence of the first locator is a waiver of his priority. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, §§ 139-141.

§ 87. Under the act of congress of May 10, 1872, to acquire any right of location and purchase of mining land, the party seeking to acquire such right must either be a citizen of the United States or must have declared his intention to become such. The affidavit of the party himself is competent evidence of his naturalization for the purpose of acquiring a mining location. *North Noonday Mining Co. v. Orient Mining Co.*, §§ 100-119.

§ 88. If an alien performs all the acts necessary to make a valid location of a mining claim, and does the work necessary to keep his claim good had he been a citizen, and conveys to a citizen, who takes possession and control and keeps up the monuments and markings, and performs the necessary conditions to keep the claims good, such citizen acquires a good and valid right to the claim, provided no rights have attached in favor of some other party prior to such conveyance. And if one or more of the locators are citizens, in that particular the location of the claim is good as to them, even though one or more of the other locators are aliens and not entitled to locate, and a conveyance to a citizen gives him a good title. A corporation created under the laws of California is a citizen within the meaning of the act of congress of May, 10, 1872. *Ibid.*

§ 89. If a party acquires and maintains a valid location of any mining claim, and is actually

on the ground prosecuting the work of developing and working the mines and exercising dominion over them, he is not merely in constructive, but in actual, possession, and such possession extends to the bounds of the claims, as described in the conveyance to him, and indicated by the stakes and notices. *Ibid.*

§ 90. The act of 1872 (17 Stat., 91; R. S., sec. 2322) recognizes locations made prior to its passage, the surface lines of which included more than one vein or lode. It reaches the case of locators, who had located claims while the act of 1866 was in force, and confirms their possession to all the surface, and all the lodes included within their lines. *Mount Diablo Mill, etc., Co. v. Callison*, §§ 183-188.

§ 91. Objection was taken to the validity of two patents, because the end lines of the surface location were not parallel as required by the act of 1872. Such patents may have been issued under the act of 1866, when such parallelism was not required. The presumption of the law is that the officers charged with the supervision of applications for mining patents and the issue of such patents did their duty. If, under any circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, §§ 139-141.

§ 92. If, after one has discovered a lode and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to a valid location, another comes to the same place and takes possession thereof to the exclusion of the first, he shall not have advantage of his own wrong, nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator. *Erhardt v. Boaro*, §§ 145-147.

§ 93. If a party discovering a mining claim is prevented from doing the necessary acts to perfect his location by the act of another in taking possession of the place in controversy and excluding the first party therefrom, he is not thereby deprived of his claim. He should make demand on such party in possession, if by so doing he could obtain possession, but he is not bound to use force. *Ibid.*

[NOTES.— See §§ 149-166.]

BELK v. MEAGHER.

(14 Otto, 279-291. 1881.)

ERROR to the Supreme Court of the Territory of Montana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz-lode mining claim, being, as is stated in the complaint, "a relocation of a part of what is known as the old original lode claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows:

In July or August, 1864, George O. Humphreys and William Allison located the discovery claim on the original lode, and claims one and two west of discovery. These locations were valid and subsisting on the 10th of May, 1872, and no claim adverse to them then existed. No work was done on them between that date and June, 1875. During the month of June, 1875, and before any relocation had been made, the original locators, or their grantees, resumed work upon the claims, and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterwards done on the property by the original locators or any one claiming under them; and it does not appear that they were in the actual possession of the claims, or any part thereof, on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the act of congress in such cases.

On the 19th of December, 1876, Belk made the relocation, under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was

peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim, which did not occupy more than two days of his time, and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st of February, 1877, the defendants entered on the property peaceably, and made another relocation, doing all that was required to perfect their rights, if the premises were at the time open to them. The possession they had when this suit was begun was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are:

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until January 1, 1877.
2. Whether, if it was a valid relocation of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceable and without force.
3. Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and,
4. Whether, even if the relocation of Belk was invalid, the defendants could, after the 1st of January, 1877, make a relocation which would give them, as against him, an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force.

By section 3 of the act of May 10, 1872, chapter 152 (17 Stat., 91), entitled "An act to promote the development of the mining resources of the United States," it was provided that the locators of all mining locations theretofore made, or which should thereafter be made, on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns, where no adverse claim then existed, should have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they complied with the laws of the United States, and with state, territorial and local regulations, not in conflict with the laws of the United States governing their possessory title. The fifth section further provided that on all claims located prior to the passage of the act, ten dollars' worth of work should be performed or improvements made each year for each one hundred feet in length along the vein, until a patent should have issued therefor; and upon a failure to comply with this condition, the claim or mine on which the failure occurred should be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal representatives had not resumed work on the claim after the failure and before the relocation. By the act of March 1, 1873, chapter 214 (17 Stat., 483), the time for making the first annual expenditure, under the act of 1872, was extended to June 10, 1874; and by the act of June 6, 1874, chapter 220 (18 Stat., 61), to January 1, 1875. The exact language of this last act is as follows: "That the provisions of the fifth section of the act, . . . passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the 1st day of January, 1875."

§ 94. *Construction of statute of May 10, 1872, chapter 15 (17 Stat., 91). The rights of an original locator of a mining claim to resume work and secure his claim.*

For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before January 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators, or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new.

From what has thus been said, it is apparent that as work was done in the present case during the year 1875, before any relocation was made, the original claim was continued in force and made operative until there could be another forfeiture by reason of the failure of the owners to do the necessary annual work. The year in which the work was done began on the 1st of January, 1875, and ended on the 31st of December. The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until December 31, 1876; and the work, if completed on that day, would be just as effectual for the protection of the claim as if it had been done on the 1st of January previous. It follows that on the 19th of December, 1876, the owners of the original location had, under the act of congress, the exclusive right to the possession and enjoyment of the property in dispute.

§ 95. *Actual possession of a mining claim is not essential to the validity of a title obtained by a valid location.*

A mining claim, perfected under the law, is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S., 762 (§§ 197-98, *infra*). There is nothing in the act of congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to

provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy, it was enacted by section 9 of the act of February 27, 1865, chapter 64 (13 Stat., 441; R. S., sec. 910), that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands, actually covered at the time by another valid and subsisting location, is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid at the time it was made, and continued to be so until January 1, 1877.

§ 96. *The right of possession of a mining claim can come only from a valid location when the claim was open to such location.*

The next inquiry is whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not, at the time, give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so that he may take what the United States has, through an act of congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here congress has said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired, and it is difficult to see why, if Belk could make his relocation on the 19th of December, he might not on the 19th of January

before. *Lansdale v. Daniels*, 100 U. S., 113, 116. The original locators and their grantees had precisely the same rights after each date, the only difference being in duration. To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace.

§ 97. *Construction of statute of limitations of Montana.*

This brings us to the inquiry whether the possession of Belk, after the 1st of January, was such as to prevent the defendants from making a valid relocation, acquiring title under it. The position taken in his behalf is, that even if the original locators or their grantees, had, under the act of congress, a right to the possession of their claim until January 1, a statute of limitations in Montana would bar their action against him for its recovery, because they had not been in actual possession within a year previous to his entry, and consequently his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for a year, would entitle him to a patent under the provisions of section 2332 of the Revised Statutes. The statute of Montana relied on is as follows: "No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interests therein or possession thereof, unless the same be held under patent from the government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff, or his assigns, or predecessor in interest, were in the actual seizin or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action." Laws of Montana, 1872, p. 591.

And section 2332 of the Revised Statutes is as follows: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession, and working of the claiming for such period, shall be sufficient to establish a right to a patent thereto under this chapter in the absence of an adverse claim."

The Montana statute was passed January 11, 1872, and the act of congress, under which both parties claim, on the 10th of May thereafter. Under the act of congress, as has just been seen, the original locators or their grantees had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1. The Montana statute, if in any respect repugnant to this, was repealed to the extent of such repugnancy by the act of congress. As between possessors, having no other title than such as is derived from mere occupancy, an action would undoubtedly be barred by the Montana statute. Whether that would be so in a case where an actual right of possession had been acquired under the act of congress is a question we need not consider, as here the controversy is not between Belk and the prior locators. It is clear that, whether in Montana an action could be maintained against him or not, his right of location depended entirely on the act of congress, and under it, as has already been seen, what he did had no effect to secure to him the grant of any rights. All he got or could get by his entry was possession, and that to be of any avail must be actual.

Under the provisions of the Revised Statutes relied on, Belk could not get a

patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and, if he was not actually in, he was in law out. A peaceable, adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in *Atherton v. Fowler*, 96 U. S., 513, to the contrary of this. In that case it was held a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved and enclosed the property. Upon that proposition the court was unanimous. We also all agree that if a peaceable entry had been made on lands which had not been enclosed or improved a good right might have been secured. The only difference of opinion we had was as to whether the entry in that case was by force or peaceably. A majority of the court thought it was forcible, while the minority considered that the case had been fairly put to the jury on the question of forcible or peaceable entry, and the effect of the verdict was that it had been peaceable.

This brings us to the facts of the present case. No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no inclosure, and he had made no improvements. He apparently exercised no other acts of ownership, after January 1, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days' work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid relocation after January 1. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry, peaceably and in good faith, for the purpose of securing a right, under the act of congress, to the exclusive possession and enjoyment of the property. The defendants, having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title.

§ 98. *A matter not brought to the attention of the trial court, nor decided by it, cannot be noticed by an appellate court.*

It is contended, however, that the court erred in its charge to the jury, because it assumed that the defendants' relocation was good if that of Belk was

bad. The notice of the relocation of the defendants was proved by the introduction of the county records, and, if we understand correctly the position which is now taken, it is that this notice was defective because of an insufficient affidavit. We cannot find that this precise objection was taken below. When the record was first offered in evidence, it seems to have been objected to generally, but afterwards, on a motion to strike it out, the reasons assigned were: 1, that the original was not shown to have been out of the possession or under the control of the defendants; and 2, that the record did not give a sufficient description of the location. As the affidavit to the notice of the relocation of Belk was identical in form with that of the defendants, it is possible such an objection as is now made was not then desirable; but however that may be, we are clearly of the opinion it cannot be made for the first time in this court. The trial below was conducted entirely on the theory that Belk had the better right, because the defendants could not in law make a relocation at the time they did. The court had the right to understand that it was conceded the defendants had perfected their title, if it could be done under the circumstances, and the special objections made to the evidence that was introduced should not be sustained. Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. Consequently, when the specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded.

This disposes of all the questions raised on the instructions to the jury. It remains to consider the various exceptions taken to the admission and rejection of testimony. These are: 1. As to the admission of the book from the office of the recorder of Deer Lodge county to prove the record of the location of the original lode claims by Humphrey and Allison. 2. As to the admission of the books of record from the same office to prove certain deeds, by which it was claimed the title of Humphrey and Allison to the original lode claims was transmitted, in whole or in part, to one Murphy; and 3. The rejection of the testimony of one McFarland, a witness produced at the trial.

§ 99. *What is a sufficient record of a mining claim.*

1. As to the proof of the record of the location of the original lode claim. As Belk sets up title only as a relocater of part of the original lode claim, he impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphrey and Allison were the locators and owners of the claim originally. The proof by the record was therefore probably unnecessary; but if not, it seems to us the book offered was sufficiently authenticated. It was one of the books of record kept in the proper office, and transmitted as such from one officer to another. The original recording appears to have been in a temporary book, and, at a very early date in the history of the county, transcribed by the deputy recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county, almost from the time of the organiza-

tion of civil government in the territory, it would be dangerous to exclude it now without any proof of fraud or mistake.

2. As to the deeds. In the view we take of the case, it is entirely unimportant whether the original lode claim had been transferred or not. The work was done in 1875 by Humphrey, one of the original locators, for the express purpose of resuming the claim. He says it was done under an arrangement which he made to that effect with Thornton, who, according to the deeds put in evidence, was the owner of three-fourths of the property, Humphrey himself owning the rest. It is a matter of no importance to Belk whether the work that was done inured to the benefit of Humphrey alone or to him with others. Without, therefore, considering any of the questions presented in the argument as to the competency of the evidence or the proper execution of the deeds, we are clearly of the opinion that there is nothing in the assignments of error affecting this branch of the case which requires a reversal of the judgment.

3. As to the testimony of McFarland. He was in effect asked whether any one had that day pointed out to him the line between the National Mining and Exploring Company's ground and the defendants'; and, if so, whom; and if he knew where the line was. There was but one question, and the objection was made to the question. It was entirely immaterial, so far as anything appears in the record, whether any one pointed out the line to the witness or not, unless it was some one connected with the suit of the parties. It is true, if he knew of his own knowledge where the line was, he might tell, but in the form the question was put he could well think he would be permitted to tell where it was, as it had been pointed out to him. The question was clearly too general, and on that account objectionable. It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put removed.

Upon a careful consideration of the whole case we find no error. Judgment affirmed.

NORTH NOONDAY MINING COMPANY v. ORIENT MINING COMPANY.

(Circuit Court for California: 6 Sawyer, 299-319. 1890.)

Charge by SAWYER, J.

Counsel on one side have presented a large number of instructions, and on the other side a less number. I have forty odd pages of instructions asked by one side. I shall not attempt to read these instructions. They are generally disconnected, and, even if correct, would serve rather to confuse than to illustrate. All, however, could not be given. I will state to counsel here, that I shall only give such of their instructions as are covered by the general charge, and in my own language, as it will be delivered to the jury. In other respects, except as given in my own language, their instructions will be refused.

§ 100. *Rights of aliens under act of 1872.*

By an act of congress, which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several

mining districts, so far as applicable and not inconsistent with the laws of the United States.

In order to acquire any right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right under the act by virtue of such location. And whether Smith, or any of such locators, was, at the time of his location, a citizen, or had declared his intention to become such, is a question of fact for you to determine from the evidence. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States.

§ 101. *How aliens may become citizens.*

A person born in foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. The foreign-born son becomes a citizen by being himself naturalized, or by the naturalization of his father during the minority of the son. If, therefore, Smith was alien born, it was necessary that he should be naturalized, or that his father should be naturalized during his minority, in order to make him a citizen. The statute, for the purpose of acquiring a mining location, makes the affidavit of the party himself competent evidence of his naturalization. It is for you to determine the sufficiency of the evidence to establish the fact.

§ 102. *By implication, under the act of 1872, a miner may limit his claim to twenty-five feet on each side of the middle of the vein.*

All the locations under which plaintiff claims were made since May 10, 1872; and, at the time they were respectively made, the statute authorized a claim to be one thousand five hundred feet in length along the vein or lode, and it was provided that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom in force at the time of the location at the place where it is made, the location may extend to the distance of three hundred feet on each side of the middle of the vein at the surface; that is to say, the claim may be one thousand five hundred feet in length along the vein, by six hundred feet wide, including three hundred feet on each side of the middle of the vein. As I construe the statute, however, and so instruct you by implication, the miners, by a rule, regulation or custom established and in force at the time and place of the location, may limit the width of the claim to twenty-five feet on each side of the middle of the vein at the surface.

§ 103. — *such limitation, however, must be sanctioned by a custom, rule or usage in force at the time.*

But such limitation to twenty-five feet on each side, to be valid, must be by virtue of a rule, regulation or custom, which has not only been established, but which is actually in force at the time of the location. The regulation must be in accordance, and not in conflict with the laws of the United States and of the state of California; and the laws of California provide that "in actions respecting mining claims, proof must be admitted of the customs, usages or reg-

ulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action." This provision is still in force, except so far as its operation is limited by the act of congress.

One of the locations under which plaintiff claims was made November 10, 1875, and the claim was relocated December 15, 1876, each time three hundred feet wide on each side of the lode; the notice in terms purporting to locate it under the act of congress allowing such location.

It is claimed by the defendant that there was, at the time of the location and relocation, a regulation in force in that district limiting the claim to fifty feet on each side of the vein, and that the location of three hundred feet is, therefore, void. Now, whether there was or not such a regulation or custom in force at the time is a question of fact to be found by the jury from all of the evidence in the case on that point. The defendant, to show a regulation limiting the location to fifty feet on each side, introduced the minutes of proceeding of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various times subsequently, amending the rules, but continuing this rule in force down to and including November 13, 1867; at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is after said location and relocation, and nine years after any meeting amending said rules. At said meeting of December 30, 1876, the miners declined to adopt "the United States mining laws;" and no action upon the subject of rules is shown to have been since had by any miners' meeting.

The plaintiff, to meet this testimony, introduced the mining records of the district, from which it appears that from and including the year 1872, when the act of congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none in 1872, one in 1873, in which no width was specified, and none in the year 1874; that, during the year 1875, eleven quartz locations were made, of which nine were made three hundred feet wide on each side of the lode, and purported to have been made in pursuance of said act of congress, and two only of fifty feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876, twenty-five locations appear to have been made, of which five were three hundred feet wide on each side of the vein; one an extension of a six hundred-foot claim, having no width mentioned, and the others fifty feet wide on each side, four of which being after the relocation by Lockberg. From this it is argued by plaintiff, that quartz mining in the district was practically abandoned for several years, and no laws on the subject were practically in force; that on the return of the miners and the revival of mining in 1875, the act of congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims three hundred feet wide on each side, and in practice adopted and generally acquiesced in that rule — the rule limiting the claims to fifty feet, by common consent, falling into disuse and ceasing to be in force. As held by the supreme court of California, in commenting upon the provision of the state statute cited, "no distinction is made by the state statute between a 'custom' or 'usage,' the proof of which must rest in parol, and a 'regulation' which may be adopted by a miners' meeting and embodied in a written local law. The law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of

the miners following its enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but in force. A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time." *Harvey v. Ryan*, 42 Cal., 628.

§ 104. — *it is a question of fact for the jury to determine whether such mining rule, usage or custom was in force at the time. Having been shown, however, to have once been in force, it is presumed to have continued so until the contrary is proved.*

It is for you, then, gentlemen of the jury, to determine whether this limitation to fifty feet was actually in force at the time the two locations, three hundred feet wide on each side, were made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and, being once in force, a presumption would arise that it continued in force till something appears showing that it has been repealed, or had fallen into disuse and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only, would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of congress referred to, and the location at first, after the revival of the mining interest in 1875, of almost all claims in pursuance of the provisions of the act, three hundred feet wide on each side, if such be the fact and in view of all the circumstances appearing in the evidence, it is for you to determine whether the fifty-foot limitation had fallen into disuse, or was really in force at the date of the two locations in question. If it was not in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of three hundred feet on each side of the vein. If the limitation was in force, then it was void as to the excess over fifty feet on each side of the vein, but valid to the extent of fifty feet and no more.

§ 105. *A vein or lode, the location of which is authorized by the act of 1872, defined.*

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no right can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich.

§ 106. *No rights can be acquired by location until a vein or lode is discovered.*

It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may, and often does, require much time and labor and great ex-

pense to develop a vein or lode after discovery and location sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the East Noonday North, for example, discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered was, in this particular, valid; otherwise not. The same observation would be true as to each of the other claims held by plaintiff.

§ 107. *A location made before discovery of a vein is not invalid, provided the discovery is made before any other party has acquired any rights therein.*

I instruct you, further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim and the location valid.

§ 108. *A party making a location of a mining claim, in all respects valid, is entitled to all veins or lodes thereafter discovered whose tops lie inside of the surface lines of the location.*

So, also, gentlemen of the jury, where a party has made a location of a mining claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and all of veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface location." That is to say, if the plaintiffs or their grantors discovered a mineral vein or lode in the North Noonday claim, and made and have now in all respects a valid location of that claim, then they are not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of their surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the plaintiff has a valid claim to six hundred feet wide, then its right extends to all such veins or lodes, under the conditions stated, within the surface lines bounding the six hundred feet drawn vertically downwards; and, if the vein in question is one of the veins having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to one hundred feet wide, and only so much, then to such veins or lodes within the one hundred feet lines.

The same principle and instruction applies to the Keystone and East Noonday North claims. If the plaintiff has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar cir-

cumstances, the apices or tops of which lie within the surface lines of such valid location or locations extended vertically downwards.

§ 109. *The location, to be valid, must be distinctly marked, so that its boundaries may be easily traced; marking by stakes and mounds and written notices is sufficient.*

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced;" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice, showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law.

§ 110. *The recording of a mining claim, to complete the validity of the location, is only necessary when there exists a custom or rule to that effect. A record, when thus made necessary, should contain the names of the locutors, the date of the location, and a good and sufficient description thereof.*

If, therefore, as the testimony tends to show, the locator of the North Noonday mining claim planted a prominent stake at a shaft sunk in the earth on a vein, lode or ledge, upon the northern side of which was placed a notice, stating that he claimed one thousand five hundred feet on "this the Noonday Quartz Lode," including all the dips, spurs, angles and feeders, together with three hundred feet on each side; that said claim begins at a point in the center of a small shaft about one-fourth of a mile northerly from Queen Bee Hill, and extends thence in a northerly direction one thousand five hundred feet to a post and mound, upon which is inscribed "Noonday Quartz Lode, Charles Smith's Northern Boundary," and erects such mound and stake at said northern boundary, and marks said inscription thereon, the location is distinctly marked on the ground, so that its boundaries can be readily traced within the meaning of the act, and is a compliance with the law in that particular. The same principle is equally applicable to the Keystone location, and to that of the East Noonday North. There is testimony tending to show that the rule and custom of miners in Bodie district, at the time the several locations under which plaintiff claims were made, required mining claims to be recorded. If you find such to have been the rule or custom in force at the time, then a record was necessary; otherwise not.

In order to make a valid record, it was necessary for it to contain the name, or names, of the locator or locutors, the date of the location, and such a description of the claim, or claims, located, by reference to some natural or permanent monument, as would identify the claim. The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the

ground. The record of each location of the North Noonday, Keystone and East Noonday North, introduced by plaintiff in evidence, contained the names of the locators, the date of their location, and a description of the claim located by reference both to the shaft and to stakes planted in the ground, having notices of the location thereon. If you are satisfied from the evidence that these records were in fact made (and there is no evidence to the contrary), and that the description of the several claims located therein contained, by reference to the natural and permanent monuments mentioned, were such as would identify the claims with reasonable certainty, then you will find the records sufficient and valid in this particular; otherwise insufficient.

As there has been much comment upon the record of the East Noonday North location, I think it proper to call your attention more particularly to it. The record appears to be a copy of the notice placed on the claim, and would, doubtless, so be understood by a miner reading it for information. A person reading the record would be informed by it that the owners of the Noonday claim were the claimants, and that the claim was named the East Noonday North, probably with reference to the Noonday claim; that it was located on Silver Hill, a natural, well-known object; that the claim commenced at a stake with a notice on it, of which the record is a copy, placed east of the Noonday shaft, which is a permanent object, having, as the testimony tends to show, already existed eight or ten years, and extended in a northerly direction from the stake one thousand five hundred feet by fifty feet on each side.

§ 111. — *the sufficiency of the description of the location is a question of fact for the jury.*

There was, then, in the record, a description of the location with reference to Silver Hill, a natural object, and the Noonday shaft, a permanent object, and it is for the jury to determine whether a miner seeking information from this record could go to the permanent object, the Noonday shaft on Silver Hill, and thence east and find the stake and notice pointing out the location on the ground with reasonable certainty. If so, the jury will be justified in finding that there is such a description of the claim in the record with reference to some natural or permanent object as to identify it, and that the location is valid in this particular. It was not necessary for the claimants to finally mark the location on the ground till after the record was made, and the testimony tends to show that the location was not fully completed till the next day after the record was made, when the locators planted this stake with the notice on the south line of the claim, and of the North Noonday claim, one hundred feet east of the Noonday shaft, with another at the northerly end, and that this became the final location on the ground, and which, the testimony tends to show, was ever after claimed and subsequently surveyed and stakes placed at the corners.

If the jury find that the location was at that time actually marked upon the ground by stakes and notices, so that its boundaries could be readily traced in the manner I before instructed you, was sufficient with reference to the North Noonday claim, then the location was sufficient in this particular also.

§ 112. *A subsequent locator of a mining claim cannot object that a prior location was not sufficiently marked at the time of its location, provided such prior location was sufficiently marked on the ground before any subsequent location was made thereon.*

The testimony also tends to show that prior to any rights being acquired by the defendant, plaintiff's grantors, in addition to the lode-line stakes set up at

the location of their several claims, planted other stakes and monuments at the various corners of their claims, thus forming a parallelogram, one thousand five hundred feet long by three hundred feet wide, including the Keystone, East Noonday North, and a portion of the original North Noonday claims, with a line of five stakes on each end of the parallelogram, and that they and the plaintiff renewed these stakes from time to time as they were removed until the work was commenced at the combination shaft, which has ever since been continuous to the present time; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking, before any rights were acquired by the defendant, was clearly sufficient to validate these claims. In regard to this point, I instruct you, gentlemen, that a subsequent locator cannot object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

§ 113. *The only work necessary to hold a claim, under the act, is \$100 in value of work, to be done on each claim each and every year after the location.*

The testimony tends to show, and there is none to the contrary, that Smith did no work on the North Noonday within the year after he located it in 1875, and supposing he had forfeited his claim, he procured Lockberg to relocate it for him and convey it on December 16, 1876; that Lockberg did so relocate it on that day and immediately conveyed it to Smith, who then, either alone or in connection with others interested with him, entered upon the claim and did sufficient work during the year to hold it for that year; and that Smith paid the recording fees, \$15.

If these be the facts, and no other rights had in the meantime attached — and there is no evidence that any had attached — then, if the location made by Lockberg was otherwise sufficient and legal, and Lockberg and Smith were American citizens, Smith, by the several proceedings, had acquired a valid right to the claim.

The statute requires \$100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon, or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

§ 114. *An alien, who has properly located a mining claim and performed the necessary work upon it, may convey the same to a citizen; and such latter acquires at once and holds a valid title to such claim, unaffected by any adverse claims or rights, except such as have been acquired prior to said conveyance.*

It is urged by defendant that Smith was not a citizen, and, therefore, that he could acquire no right by location. In view of this claim, and in case you find from the evidence this to be the fact, I give you this further instruction: The testimony shows that Smith, at various times before defendant acquired any interest, conveyed portions of whatever right he had to other parties next hereinafter named, and finally on September 28, 1878, conveyed all his remain-

ing interest in all of the claims by specific description to said parties, Irwin, John and James Welch, and Patrick Clancy, in whom whatever interest had before been acquired by virtue of said several locations at this time had become vested.

If Smith, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good had he been a citizen until he conveyed to Irwin and others, and if Irwin and his co-grantees were citizens, and after the conveyance to them took possession and control, and kept up the monuments and markings, and performed the necessary conditions to keep the claims good, then they acquired a good and valid right to the claim as against defendant from the date of the conveyance to them, provided that no other rights had attached in defendant's favor prior to such conveyance to them, and such subsequent performance of said required conditions by them.

§ 115. *A joint location of a mining claim by a citizen and an alien is good as to the former, provided it does not exceed in surface quantity the amount allowed one locator, and a conveyance by both to a citizen gives a valid title.*

The East Noonday North claim was located by Welch, Smith and Irwin, November 27, 1877, before any rights had been acquired by the Orient Company, defendant. The claim contains no more than one man was authorized to locate. So that, if one or more of the locators were citizens in that particular, the location of the claim was good as to such citizen or citizens, even though one or more of the others were aliens and not entitled to locate. If, therefore, one or more of these locators were citizens, and the claim was in other particulars well located, and the proper conditions performed to hold the claim till the subsequent conveyance to plaintiff, November 20, 1878, a good title thereto as against defendant passed to the North Noonday Company, plaintiff, by that conveyance.

§ 116. *A corporation properly created and organized is to be deemed a citizen within the meaning of the mining act of 1872.*

The North Noonday Mining Company, plaintiff, is a corporation created and existing under the laws of California, and is, therefore, to be deemed a citizen within the meaning of the statute, and as such, is competent to purchase and hold a mining claim. Irwin, the Welches, and Clancy, as locators of the East Noonday North, and grantees of Smith of the other claims and of his interest in the East Noonday North, held all the interest in all said claims acquired by the various proceedings in question, and so holding such interest on November 20, 1878, conveyed all the interest in all said claims to the North Noonday Mining Company, plaintiff, which thereby became vested, with all the interest that could be acquired by virtue of said transactions. If, therefore, the grantors of plaintiff had performed all the acts necessary for a citizen to perform, in order to locate and hold said several claims down to the date of said conveyance, and the said plaintiff took possession and control of said several claims upon receiving said conveyance, and thereafter kept the said claims properly marked on the ground, and performed all the conditions necessary to maintain their said claims, then said plaintiff acquired a good title to such of said claims as were so properly in form located and kept up as against said Orient Mining Company, defendant, provided said defendant acquired no rights in said claims or any of them prior to the acquisition of said interest by said plaintiff through said conveyance, and such subsequent acts of said plaintiff to preserve their rights to said claims, even

though one or more of said original locators should be found not to have been citizens, and, on that ground, incompetent to acquire any title under said act of congress.

§ 117. *Actual possession of a mining claim defined.*

The testimony tends to show various work done on the several claims by the claimants Welch, Smith and others, during 1877 and 1878, claimed by plaintiff to be sufficient to hold the claims; that Welch in August, 1878, placed a line of mounds and stakes on each end of the several claims, fifty feet apart, for a distance of some three hundred feet, by way of indicating the corners and end lines; that Anderson, on October 19, 1878, measured off the claims and again set stakes according to the proper measurements; that these stakes being four inches square, three and one-half feet high, painted white, and marked so as to indicate the corners and lode lines of the said claims, were found there by Scowden when he finally surveyed the claims in the following spring and located the shaft.

The testimony further tends to show, and, as to this part of the testimony, I believe there is none to the contrary—if there is any you will remember it—that the interest in all three claims having been concentrated in the plaintiff, the North Noonday Mining Company, in the preceding November, the plaintiff in March, 1879, before any other parties had entered upon these claims, or made any claim thereto, located and made arrangements to sink a three-compartment shaft, known as the combination shaft, for the benefit and to be used for the development of all the claims, and also the Noonday claim to the south; that machinery and supplies were at once collected and brought upon the ground for the purpose of sinking said shaft and developing and jointly working all said claims; that from that time on the plaintiff by his agents and servants was actually on the ground erecting machinery and buildings, exercising acts of ownership and dominion over the claims, claiming title to the whole; that the plaintiff commenced sinking the combination shaft on or about April 5, 1879, and from that time to the present has been, by its agents and servants, actually on the ground constantly and vigorously prosecuting the work of developing and working the mines claimed by them, and constantly exercising dominion over them; that by June 1, buildings and machinery had been erected and brought upon the ground, and supplies collected to the amount of more than \$30,000.

If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining claims by virtue of the mining laws alone, but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds of the claims, as described in the conveyance to plaintiff, under which it claimed title, and as indicated by the stakes planted by Anderson and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, the testimony tends to show, in one body and conveyed by one deed to the same party, and being developed by the same means as a part of one general system. If, therefore, you find from the evidence that the plaintiff acquired and maintained a valid location to all or any of these claims in question by the means in these instructions before indicated, and performed the acts of possession just supposed, before any right had accrued to defendant, then, as to such claim or claims, the plaintiff had as against the defendant both

a good title and rightful possession at the time the trespasses are alleged to have been committed, and when it is conceded that the defendant actually entered and committed the acts complained of, and you will find for the plaintiff on those points.

If you find title and rightful possession in the plaintiff as just indicated, as to all or any of said mining claims, you will then inquire whether the vein or lode in question, which defendant cut in the head of the winze at the end of its cross-cut, called by defendant Orient Lode No. 3, is one of the veins or lodes discovered in any of the claims, the right, title and possession to which you find to be in the plaintiff as against defendant, and if you find that it is one of such veins or lodes, or if you find that it is not one of those lodes, but that it has its apex or top within the side lines of any such claim, the title and possession to which you so find to be in the plaintiff, drawn vertically downwards, then, in either case, it belongs to the plaintiff, and your verdict will be for the plaintiff. But if you find that said vein or lode so cut by defendant is not one of the veins or lodes discovered within any claim, the title to which you find in the plaintiff, and that its apex or top is not within the side lines of any such claim of plaintiff drawn vertically downwards, but is a separate, independent vein, every part of which lies to the eastward, or outside of and beyond any claim, the title to which you find to be in plaintiff, and no part of the apex or top of which is within the side lines of such claim drawn vertically downwards then it does not belong to plaintiff, and your verdict will be for defendant.

If you find for the plaintiff, gentlemen, you will then inquire what the damages are. The testimony on the question of damages is, that about fifty-five tons of ore has been taken out, and I think the testimony is that it is about \$25 or \$30 per ton in value. The damages will be the value of the quartz removed; at all events, if you cannot agree on the damages, they are entitled to nominal damages, say \$1. If you find for the plaintiff, your verdict will be: "We, the jury, find for the plaintiff, and assess the damages at so many dollars." If, on the other hand, you find for the defendant, your verdict will be: "We, the jury, find for the defendant." (Verdict for the plaintiff.)

NORTH NOONDAY MINING COMPANY v. ORIENT MINING COMPANY.

(Circuit Court for California: 6 Sawyer, 503-508; 11 Federal Reporter, 125.) 1880.

Motion for a new trial.

Opinion by SAWYER, J.

All the points made by defendant on motion for new trial were fully argued and considered at the trial, and I see no good reason for changing the rulings then made.

§ 118. *Under section 2321, Revised Statutes, the affidavit of the locator of a mining claim is admissible as proof of his citizenship.*

The point most confidentially relied on by defendant seems to be the admission of the affidavit of Smith to prove his citizenship. I am not entirely certain that any other evidence was necessary to raise the presumption of citizenship than the fact that he had resided in the United States from his infancy — during all the period of his remembrance — he having no personal knowledge of having been alien born, and no recollection of ever living elsewhere; and there being no evidence from any one having knowledge that he was foreign-born. If this be so, then there is no evidence to overthrow the presumption, other than his statement that he was informed that he was born

in Ireland, and brought to this country by his parents when two years old; and this is but hearsay, and his counter-statement, that he was informed in the same manner, and had always understood, that his father became naturalized while he was a boy, is at least as good. If the hearsay evidence was inadmissible and proves nothing upon the one point, it was equally so on the other. It must all be taken or all be rejected together. But, if it was necessary to make this additional proof, the affidavit was, undoubtedly, inadmissible upon the general principles of evidence unaffected by statutory provisions.

The statute, however, has made especial provisions for such cases in section 2321, which says: "Proof of citizenship under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief." This provision must of necessity contemplate an affidavit, to some extent based on information and belief, for no man can, of his own personal knowledge, state where he was born. It is an event occurring before he has acquired a capacity to remember. It also substitutes an affidavit for the record in this case of one's having been naturalized. It, also, contemplates an affidavit on information and belief, where the naturalization of persons other than the party making the affidavit are concerned; for the affidavit of the "authorized agent" of associations not incorporated may be "upon information and belief." It might be utterly impracticable for a person whose father had been naturalized and moved to some distant territory, and died during his infancy, as is supposed to be the case in this instance, to ascertain in which one of the hundreds of courts in the United States having jurisdiction the father was naturalized. At all events, in view of the practical difficulties in making the proofs, or for some other reason, the statute has modified the rule of evidence in this instance, and made such affidavits not only competent, but sufficient proof of citizenship; for it requires no other. It is insisted, however, that this is admissible only in the land-office for the purpose of entitling the locator to a patent, but does not extend to suits between private parties respecting the right to the claim. But the statute says "*under this chapter*," and the chapter provides for sending the parties to the courts to try their rights when there are conflicting claims; and, in my judgment, the provisions apply to all the purposes of the act—to the litigation of all claims arising under the act, whether in the department, or in the ordinary courts of the country. Evidence which is competent and sufficient to establish a right to a patent to a mining claim as against the government—the actual owner of the land and mine—ought to be competent and sufficient to maintain the party complying with the statute in his possession and claim against a stranger trespassing upon his possession and claim, which would be otherwise recognized as valid by the statute as against the government. I do not think congress designed to establish one rule of evidence or right for the government, and another for citizens, as to the same claim arising under the statute, and especially in favor of trespassers upon the possessions of others. I, therefore, hold the affidavit of Smith to be competent evidence, and properly admitted under the statute.

§ 119. *A party in the actual possession and occupation of a mining claim, as provided for by the provisions of the mining act, has, as against all others, a perfect title thereto, and any one entering thereon without a prior right is a trespasser.*

But conceding, for the purposes of this decision, the admission of the affi-

davit as to citizenship to be erroneous, still, in view of the other uncontradicted testimony in the case, the error became immaterial. It appeared by clear, uncontradicted, positive testimony, that the plaintiff's grantors, some, at least, of whom were citizens before defendants entered or began to run their tunnel, distinctly marked the three claims, limiting the Noonday North to one hundred feet wide, by stakes driven at each corner and the center of the end lines, the stakes being three and a half feet high by four inches square, painted white and lettered to show what they were, and what claims they indicated, each claim so staked out being one hundred feet wide, and one thousand five hundred long, lying side by side, and within the limits of the lines of the original Noonday North as located three hundred feet wide on each side of the center. These stakes bounded a parallelogram three hundred feet wide by one thousand five hundred long, marked by a line of five stakes as described on each end. These claims were conveyed to the plaintiff by one and the same deed giving definite descriptions, and the plaintiff went into actual possession and occupation of them, claiming title under the deeds up to the extreme boundary as staked off, long before defendant entered, and they so continued on the claims, erecting machinery and sinking shafts for working the claims, down to and at the time of defendant's entry and the trespass complained of, having at the time of such entry and trespass expended in labor and the collection of materials on the premises the amount of some twenty-five or thirty thousand dollars. So that before defendant acquired any rights, and down to and at the time of defendant's entry, the plaintiff was in the actual, active, dominating possession, occupation and control of the premises thus marked out and thus conveyed, claiming the whole under the conveyance. Plaintiff's said stakes were still there as described when defendant entered and committed the trespass complained of, and defendant made its claim within the claims so at the time staked out. As to the extent of the possession of parties actually in possession, claiming under deeds and up to marked boundaries, see *Hicks v. Coleman*, 25 Cal., 122, and the numerous cases from the United States supreme court reports therein cited. *Walsh v. Hill*, 38 id., 487.

The plaintiff, before defendant acquired any rights, and at the time of its entry and of the trespass complained of, was in as complete actual possession and occupation up to the boundary indicated by their stakes as it could well have been, except by inclosing it with a fence sufficient to exclude trespassers. The plaintiff was there physically present by its agents, in active labor and control. This being so independent of such constructive possession as the mining laws give by simple compliance with its provisions, there was a continual actual possession and occupation, upon which defendant could not enter without being a trespasser. The supreme court of California held that a mining claim in actual possession of the claimants is valid, irrespective of mining laws. *English v. Johnson*, 17 Cal., 107; *Table Mountain Tunnel Co. v. Stranahan*, 20 id., 209; S. C., 31 id., 390; *Hess v. Winder*, 30 id., 355; *Rogers v. Cooney*, 7 Nev., 219. These cases have been cited and approved by the supreme court of the United States in the recent case of *Campbell v. Rankin*, 99 U. S., 262. And as I understand the recent decisions of the supreme court of the United States under the pre-emption laws, no man can initiate a pre-emption or other right under those laws by an entry upon the actual possession of another, be that other a competent pre-emptioner, or rightfully in possession, as against the government or otherwise. *Trenouth v. San Francisco*, 100 id., 251, 256; *Atherton v. Fowler*, 96 id., 513. If that be so, the principle is equally appli-

cable to rights acquired in mining claims. It would be strange indeed if congress should pass laws to encourage trespasses and breaches of the peace, by authorizing a title to be initiated and founded upon a trespass, upon the actual possession of another.

Upon the whole record, I am entirely satisfied that a new trial should not be granted, even if there was error in admitting the affidavit of Smith, and the several other affidavits, to which exception was taken in the course of the trial, on the question of citizenship. On this view, also, errors in other rulings, if any there be, become immaterial. Ordered, that a new trial be denied.

JUPITER MINING COMPANY v. BODIE CONSOLIDATED MINING COMPANY.

(Circuit Court for California: 7 Sawyer, 96-117. 1881.)

Charge by SAWYER, J.

I do not understand the defendant to insist that the plaintiff has not made out a *prima facie* title to the ground covered by its claims, now known as the Jupiter Company's ground, embracing the four claims — the Savage, the East Savage, the Riordan, and the Daley. It does claim, however, by its own evidence, to overthrow that title, by showing a title in itself prior and superior to that title. *Prima facie* I do not understand the defendant to claim that plaintiff has not shown its title to these claims, but the question that arises on its title is, Is the point on the Actæon vein where the acts complained of were committed, within the claims of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein it cannot recover in this action. That point, therefore, is an important one for you to determine, and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first; I will, therefore, first call your attention to it. If you find that point against the plaintiff, it will be necessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims drawn vertically downwards.

The first question then is, Is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model), from this point downwards in what has been termed — and the name may be used to designate the place here — the Actæon ledge. The plaintiff insists on two positions, first, that it is the lode which its grantors located in the Savage, and which claim was located in this lode here, which, plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on, or claim that it was any other lode than that, I believe. Then is it identical with the lode which was located in the Savage claim? Now, this is known to have been exposed, and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question — whether it is, or is not, that lode. It is insisted on the part of the defendant that this is a mere spur or offshoot of the Fortuna lode. If

it is not such a spur or offshoot, then, it insists that it is an independent lode, wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode. It is for you to determine from the testimony whether it is part of the Fortuna lode; or whether it is an independent lode; or if it is a part of the Savage lode. If it is a part of that lode in the Savage which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not title to the lode through the Savage, or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downwards? Because, if it has, and the plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downwards, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that then it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode, the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and according to their measurement and their testimony, the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it is an independent lode, and has its top or apex outside of the Daley claim, then it does not belong to the plaintiff. If it is inside of the Daley, if it has its top or apex inside of the Daley or Savage, it does belong to the plaintiff if they have the better title to those claims.

Professor Jenny and Mr. Holmes, on the contrary, testified that they put a plumb-line on the vein, although they do not profess to have measured the angle, and they say it is nearly perpendicular; and, supposing it to go in that direction to the surface, it would come very near to the Daley line, and a little inside. Where the top or apex is, is for you to determine. The plaintiff claims that, owing to the formation of the country rock, the probability is that the vein runs to this point, and then turns off and runs into the Savage. The plaintiff's theory, as I understand the testimony, is, that here are two different formations. This formation to the eastward is a secondary formation; this to the westward is a primary (pointing to the map). That the line of stratification runs in different directions in the two formations there. That is claimed to be secondary (pointing). If you believe that theory as to the formation of the rock here, and believe that the lodes found outside or to the eastward of this blue clay stratum run in this direction, and the stratification there in the same direction dipping to the west, and the leads and stratification to the westward, in this direction, dipping to the east, then it will be a question of probabilities for you to determine whether or not this Actæon

lode passes up and crosses over the blue clay stratum into the other formation, thence following its line of stratification to the surface, or is it more likely to have pursued its course in its own formation, following the line of its stratification, as this Fortuna vein has apparently done here, on the same side of the stratum of blue clay. This Fortuna vein, it would seem, follows its own formation and line of stratification throughout. You are entitled to consider the probability — if these are different formations, as they say — the probability whether the Actæon vein would run in that direction and pass out here into another formation, or whether it would be confined to the formation in which it is found, and to which it properly belongs. I can give you no further aid on that question. You must take the testimony as you find it, and view it with a candid and impartial spirit, and give such determination to the question as you think all the facts and circumstances in the case justify. If, then, the Actæon vein is not one of the lodes located by plaintiff; if it has not its top or apex within the side lines of any one of the claims of plaintiff drawn vertically downwards, then it is not the plaintiff's lode, and you will have to find for the defendant, whether the defendant owns it or not. If you find for the defendant on that proposition, that disposes of the case, and there is no necessity to spend any further time on the other points of the case. If you find for the plaintiff, however, on that issue, that the Actæon is the lode that the plaintiff has located there in the Savage, or has its top or apex within the side lines of any one of the claims that the plaintiff owns drawn vertically downward, it will be necessary for you to consider the defendant's title — whether the defendant has an anterior and a superior title; otherwise it will not be necessary to look at its title. I will say, with reference to this branch of the case, that the plaintiff alleges this to be its lode. It devolves upon plaintiff, therefore, to show affirmatively to you that it is entitled to that lode. The burden of proof is on the plaintiff. If it fails to show it, or if the testimony is equally balanced, then you must find for the defendant, because plaintiff must show by a preponderance of testimony that the lode is within its claim. If it fails on that, your verdict must be for the defendant.

If you find for the plaintiff on that point, as I said before, it will be necessary to consider the defendant's title. I will say, with reference to the defendant, as I said with reference to the plaintiff, when you come to the defendant's title the burden of the proof is on the defendant. It devolves on it in the same way by preponderance of evidence to show that its title is anterior and superior to that of the plaintiff.

Now, gentlemen, in order that you may know whether the defendant has a title or not, it will be necessary for you to be informed what is necessary to do in order to secure a title to a mining claim.

By an act of congress, which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase, under regulations prescribed by law, and according to the local customs or rules of miners in the several districts, so far as applicable, and not inconsistent with the laws of the United States.

§ 120. *Length and width of lode claims as authorized by act of congress, May 10, 1872.*

The location under which defendant especially claims was made since May 10, 1872, and at the time it was made the statute of the United States authorized a claim to be one thousand five hundred feet in length along the vein or lode, and it was provided that no claim "shall extend more than three hun-

dred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location at the place where it is made, the location may extend to the distance of three hundred feet on each side of the middle of the vein at the surface; that is to say, the claim may be one thousand five hundred feet in length along the vein by six hundred feet wide, including three hundred feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implication, the miners, by a rule, regulation, or custom established and in force at the time and place of the location, may limit the width of the claim to twenty-five feet on each side of the middle of the vein at the surface. But such limitation to twenty-five feet on each side, to be valid, must be by virtue of a rule, regulation or custom, which has not only been established, but which is actually in force at the time of the location.

§ 121. *How far claims are to be controlled by miners' rules. California law in force; what it prescribes as to custom and usage.*

The regulation must be in accordance, and not in conflict, with the laws of the United States, and of the state of California; and the laws of California provide that, "in actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and *in force* at the bar or diggings embracing such claim, and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action." This provision is still in force except so far as its operation is limited by the act of congress.

The Lucky Jack location, under which defendant claims, was made May 26, 1875, and the claim was located three hundred feet wide on each side of the lode in pursuance of the act of congress allowing such location.

It is claimed by the plaintiff that there was at the time of the location a regulation in force in that district limiting the claim to fifty feet on each side of the vein, and that the location of three hundred feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time is a question of fact to be found by the jury from all of the evidence in the case on that point.

The plaintiff, to show a regulation limiting the location to fifty feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation and minutes of meetings held at various subsequent times, amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had, till December 30, 1876, which is a year and seven months after said location, and nine years after any meeting amending said rules.

The defendant, to meet this testimony, introduced in evidence the mining records of the district, from which it appears that no miners' meeting was held, and no mining recorder was elected, from July 3, 1869, till October 9, 1875,—more than six years,—and that from and including the year 1872, when the act of congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district; there being none after the passage of the act of congress in 1872; one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875

eleven quartz locations were made, of which nine were made three hundred feet on each side of the lode, and purported to have been made in pursuance of said act of congress, and two only of fifty feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876 twenty-five locations appear to have been made, of which five were six hundred feet wide; one an extension of a six hundred foot claim having no width mentioned, and the others fifty feet wide on each side. From this it is argued by the defendant that quartz mining in the district, so far as new locations are concerned, was practically abandoned for several years, and no laws on the subject of new locations were practically in force; that on the return of the miners, and the revival of mining in 1875, the act of congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims three hundred feet wide on each side, and in practice adopted and generally acquiesced in that rule during the year 1875, and partially in 1876, till the meeting in December of that year — the rule limiting the claims to fifty feet by common consent falling into disuse and ceasing to be in force.

§ 122. *Mining usage and custom.*

As held by the supreme court of California, in commenting upon the provision of the state statute cited, which is still in force: "No distinction is made by the state statute between a custom or usage, the proof of which must rest in parol, and a regulation which may be adopted by a miners' meeting, and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following the enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but *in force*."

"A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time."

It is for you, then, gentlemen of the jury, to determine whether this limitation to fifty feet was actually in force at the time the location of the Lucky Jack, three hundred feet wide on each side, was made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse, and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.

§ 123. *A location exceeding the lawful width is void only as to the excess.*

Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of congress referred to, and the location at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, three hundred feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the fifty feet limitation had fallen into disuse or was really *in force* at the time of the location in question. If it was *not* in force, then, in that particu-

lar, if otherwise valid, the location was good and valid to the full extent of three hundred feet on each side of the vein. If the limitation was in force, then it was void as to the excess over fifty feet on each side of the vein, but valid to the extent of fifty feet and no more.

§ 124. *Rule as to the discovery of a vein in a location. What is a vein.*

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode, within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place.

The vein, however, may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the Lucky Jack discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered, was in this particular valid—otherwise not. The same observation would be true as to each of the other claims held by the plaintiff or defendant.

The defendant claims that its grantor discovered such a vein or lode as I have described in Lucky Jack, shaft No. 1. You have heard the testimony on the point, and it is for you to determine whether they did or not. If they did, then the location is good in that respect; otherwise it is not.

§ 125. *Rule as to first discoverer.*

It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him and claimed by him in order to give validity to the location. I instruct you further that if a party should make a location in all other respects regular, and in accordance with the laws and the rules, regulations and customs in force at the place at the time upon a supposed vein before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery, his claim would be good to the limits of his claim, and the location valid.

The defendant also claims that its grantors discovered veins in shaft No. 2, and its drifts and cross-cuts, long before plaintiff acquired any rights in the ground. If so, the claim is good in that particular. Similar discoveries are claimed to have been made by its grantors in the Warren Loose shaft, drift, winze, etc.

§ 126. *Right to lodes or veins within the location.*

So, also, gentlemen of the jury, where a party has made a location upon a mineral vein or lode, discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession, and enjoyment of all the surface included within the lines of his location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical lines of such surface location."

That is to say, if the defendant or its grantors discovered a mineral vein or lode in the Lucky Jack claim, and made and has now in all respects a valid location of that claim, then it is not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of its surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time its location became valid, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the defendant has a valid claim to six hundred feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the six hundred feet drawn vertically downwards; and if the Actæon vein in question is one of the veins, having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to one hundred feet wide, and only so much, then to such veins or lodes within the one hundred feet lines.

The same principle and instruction applies to the defendant's other claims. If the defendant has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apices or tops of which lie within the surface lines of such valid location or locations extended vertically downwards.

§ 127. *How location is to be marked. Obliteration of marks does not divest title.*

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that the "location must be distinctly marked on the ground, so that its boundaries can be readily traced," but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground, and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator, so long as he continues to perform the necessary work upon the ground and to comply with the law in other respects.

If, then, the jury believe from the evidence that the Lucky Jack claim did not exceed in quantity the amount allowed by the United States laws, and was located in conformity with the actual practice and custom of miners in force in the year 1875, as to the size of claims in the Bodie mining district, and that

before the location of the claims of the plaintiff thereon it was actually and distinctly marked on the ground by stakes, notices, monuments and work, so that its boundaries could be readily traced, and a vein containing gold or silver had been discovered therein, and sufficient work was done thereon to comply with the laws of congress and the local regulations, and if no record was required other than that actually made, then the Lucky Jack location was valid, and entitled the locator to the exclusive possession thereof. Otherwise not.

§ 128. *Rules as to recording of miners' claims. Object and effect of recording. Custom.*

There is testimony tending to show that the rule and custom of miners in Bodie district at the time the Lucky Jack location, under which defendant claims, was made, required mining claims to be recorded within a certain time after location, and testimony also tending to show that there was no mining recorder elected in Bodie district from July 3, 1869, to October 9, 1875—more than six years, including the period of this location; and that, during a portion of this time, at least, in the apparent uncertain condition of affairs, some locators recorded their claims in the office of the county recorder, and also in the books of the district in the possession of the last preceding recorder, or of the last preceding deputy recorder of the district, and the Lucky Jack, at least, in the county recorder's office only.

If you find a rule or custom to record to have been in force in the district at the time, then a record was necessary to perfect and preserve the rights of the locators, as against all subsequent locators, at least, not having actual notice of the prior location. If no such custom was in force, then no record was necessary. It was only necessary, in any event, to record at the place where the custom known and in force at the time of the location required the record to be made. If it was sufficient, under the custom in force, to record the location in the county recorder's office, then a record there was sufficient; otherwise not. And the fact that many miners did so record, is evidence tending to show that they thought such record available, and relied on it, and tending to show such custom. The custom to record, *and the place of the record*, to be binding, ought to be so well known, understood, and recognized in the district, that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location. It is for you, gentlemen, to determine from the evidence in the case what record, if any, and the place where it must be made, the custom in force at the time required; whether the custom was in all particulars sufficiently known and recognized to make it binding upon the miners; and whether the location of the Lucky Jack claim substantially conformed to it. In determining these questions, the fact, if it be a fact, that there was an uncertainty as to where a record should be made—some recording in the district records, some in county recorder's office, and many in both; the fact that there was no recorder elected for six years; that Bechtel, the last deputy, and the man who seems to have actually done the recording, resided during a portion of the time out of the district, coming, in some instances, at the request of parties, from his residence, into the district to record claims; and the fact that miners, at their first meeting in October, 1875, after several years' *hiatus* in their meetings, deemed it necessary, or at least prudent, to ratify and validate, by resolution, the records of the preceding five or six years, are all circumstances that the jury are entitled to consider, as tending to show that there was no custom as to the place where the record should be made, prevailing during that period, sufficiently certain, well known, and de-

fined, and generally recognized and acquiesced in, to be of any binding force. The jury are entitled to give these circumstances such weight, in connection with all the other evidence bearing upon the question, as they deem them entitled to receive. And it is for you to determine whether, under the circumstances, a record in the county recorder's office was sufficient.

If a record was required then, in order to make a valid record, it was necessary for it to contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground.

The exact effect of a record, or want of a record, I have not before had occasion to consider. The law of congress authorized miners to make regulations "governing the location and manner of recording . . . mining claims." This language implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location, or one of the acts necessary to constitute a location. But in the Bodie mining district there is no evidence of a miners' regulation or rule which makes recording an act of location or necessary to a valid location. The location is always referred to in the rules in evidence as distinct from and preceding the record, so that a location of a mining claim in that district, at any time in the year 1875, may have been complete or perfect before any record thereof was made.

Independent of the question of forfeiture, therefore, it follows under the written rules in evidence, that by an otherwise valid location of a mining claim in the Bodie mining district, at any time in 1875 a person may have acquired the exclusive right of possession and enjoyment of such claim, at least as against other parties having actual notice of the claim, its position and extent, before recording such location.

§ 129. *Failure to record, when a cause of forfeiture.*

Assuming the proposition that the miners have authority to make a regulation or law by which a mining claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim. In the language of the supreme court of California: "The failure of a party to comply with a mining rule or regulation cannot work a forfeiture unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture; if so, a failure will not work a forfeiture." *Bell v. Bed Rock Tunnel Co.*, 36 Cal., 219. "The failure to comply with any one of the mining rules and regulations of a district is not a forfeiture of title. It would be enough to hold the forfeiture as the result of non-compliance with such of them as make non-compliance a cause of forfeiture." *McGarrity v. Byington*, 12 Cal., 431. As a general principle of law forfeitures are not favored.

The object of recording mining claims is to give notice to others desiring to locate claims in the vicinity. The congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules.

§ 130. *Effect of actual notice.*

If there were no local rules in Bodie mining district, attaching the penalty of forfeiture to the failure to record in that district, and recording was not made by custom an act of location, then the fact that the Lucky Jack claim was not recorded in the records of Bodie mining district will not invalidate the location as to any party having actual notice of that location, and in that case the jury are instructed that if the Lucky Jack location was regular in all other respects, and the laws requiring work were complied with, the fact that the claim was not recorded in the Bodie mining district did not invalidate the location or make it lawful for plaintiff's grantors, if they had actual notice of the previous location, to enter and locate the ground covered by the Lucky Jack location.

The testimony also tends to show that prior to the location of the Daley claim, or to any rights being acquired thereunder by the plaintiff, the defendant or its grantors, in addition to the stake or stakes, whichever it was, and notice put up at the time of location of the Lucky Jack claim, surveyed out that claim and planted prominent surveyor's stakes and monuments at the various corners of the claim, distinctly marking it out and forming a parallelogram one thousand five hundred feet long by three hundred feet wide, and entered into actual possession, and it is claimed that if there was at the time of the location any defect in the marking, on the ground, this additional marking, before any rights were acquired by the plaintiff in the Daley, was clearly sufficient to validate the claim as to that location. In regard to this point, I instruct you, gentlemen, that a subsequent locator cannot object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

If, therefore, the claimants of the Lucky Jack surveyed and properly staked or marked out their claim and performed all the other acts necessary to make a valid location, before any rights were acquired in the Daley ground by the location of that claim, then the better title vested in the owners of the Lucky Jack to all the Daley claim embraced in the Lucky Jack, which the locators of the latter were entitled to locate and hold.

§ 131. *Work necessary to hold a claim.*

The statute requires \$100 in value of work to be done on each claim, located after May 10, 1872, in each year, in order to hold it; and in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon, or to relocate a claim before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

§ 132. *Work to hold adjoining claims.*

Whether the work was done as required by the statute is a question for you to determine from the evidence. Work done by any of the grantors of defendant while holding the claim, whether holding the legal or equitable title, during the performance of the labor or work done in the interest of the claim,

is available to preserve the claim, and no mere relocation for forfeiture, made before the forfeiture actually attaches by actual default, would be valid to defeat the claim. Any work done by the Bodie Company on the claim for that purpose, after the conveyance to it October 7, 1877, and before May 26, 1878, is available as work for the year from May 26, 1877, to May 26, 1878, to prevent a forfeiture. With regard to the work required to be done in order to hold a claim, the jury are further instructed, that where one person or company owns several contiguous or adjoining claims, capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

To conclude, gentlemen of the jury, in view of the legal principles I have stated to you, if you find from the evidence that the so-called Actæon vein, upon which the trespass is alleged to have been committed, is not one of the veins actually located in either the Savage, East Savage, Riordan or Daley claims, and if its top or apex is not within the planes of the side lines of either of said claims drawn vertically downwards, then it does not belong to the plaintiff, and your verdict must be for the defendant, whether it has title to the claim or not. The plaintiff cannot recover unless the vein belongs to it. So if the top or apex of said Actæon vein is within the planes of the side lines drawn vertically downwards of any mining claim, to which the defendant has shown a valid title prior in point of time to the title to any of the four claims relied on by plaintiff in like manner embracing said vein, whether such valid prior claim of defendant be six hundred or one hundred feet wide, the verdict must also be for the defendant.

But if, on the contrary, you find that the said Actæon vein, at the point where the trespass is alleged to have been committed, is the vein actually discovered and located by plaintiff's grantors, in any one of the said four claims of the plaintiff, or that it has its top or apex within the planes of the side lines of any one of said four claims drawn vertically downwards, and if you further find that the defendant has not shown a title as against said plaintiff by a valid subsisting prior location embracing said top or apex within its side lines drawn vertically downwards, then your verdict must be for the plaintiff.

Gentlemen, I believe the testimony is very indistinct as to the amount of damages. No testimony was offered as the amount of damages. If you find for the plaintiff, and you have no testimony on which to estimate correctly the amount of damages sustained, you will find nominal damages, say \$1. The form of the verdict will be, "We, the jury, find for the plaintiff, and assess the damages at so much." If you find for the defendant your verdict will be, "We, the jury, find for the defendant."

MOUNT DIABLO MILL AND MINING COMPANY v. CALLISON.

(Circuit Court for Nevada: 5 Sawyer, 439-457. 1879.)

Opinion by HILLYER, J.

STATEMENT OF FACTS.—This is an action to recover possession of a mining claim situated in the Columbus mining district, Esmeralda county, Nevada.

The complaint alleges ownership of fourteen hundred feet of a certain quartz lode, called the Dinero lode, seven hundred feet easterly and seven hundred feet westerly from the Dinero location monument, "together with one hundred feet of surface on each side of said fourteen hundred feet of said lode," with all the dips, spurs, etc.; and also all that portion of the Dinero, and of all other lodes or veins, the top or apex of which lies within such surface lines, and end planes drawn north and south through points seven hundred feet east and west from a stake marked "Centre Mount Diablo claim."

The trial has been by the court, a jury having been waived by a written stipulation of counsel. There has been a somewhat extended oral argument, and, in addition, a very full discussion of all the points in briefs.

The point most discussed is as to the lateral boundaries of the Mount Diablo lode; the plaintiff contending that the Mount Diablo, Dinero and Callison, or "Mountain Boy," claims are all on one and the same vein or lode, and the defendants that the Callison is a lode distinct from every other in that district. By agreement of parties, three scientific mining experts only were examined on each side. For the plaintiff, W. S. Keyes, Carl Davis and Dr. Blatchley are of opinion that the said claims are on one single lode. For the defendants, C. A. Luckhart, Professor W. F. Stewart and Charles F. Hoffman are of opinion that the Callison is a separate lode. All of these experts are men of large and practical experience in mining. Each one has examined the mining region now in question with care, and has, under oath, stated the facts upon which he bases his opinion. If the court is not now fully informed, such result is not due to the failure of the parties on either side to present their case thoroughly, but to the inherent difficulties to be found in the questions brought forward for decision.

We proceed now to a consideration of the first question stated, namely, whether the Mount Diablo and Callison claims are on the same or separate lodes.

We find at the point where the claim in controversy is located a metalliferous belt, or zone, or district, extending east and west some two miles in length, the width of which has not, so far as appears in this case, been accurately ascertained. Scattered over this belt or zone, a dark rock stained with iron and manganese is seen, called by all the witnesses croppings. Looking west, from the Mount Diablo claim, the general course of the metalliferous region can be seen marked by these black croppings for about two miles. Along this line a great many claims have been located; in some cases several claims being parallel, or nearly so.

Describing this belt of country at the point where the claim in dispute lies, the experts tell us that they find on the south of the Peru claim, and perhaps coming into that claim, a rock in place which they call, variously, silicious, or stratified, or unaltered clay slate. (The Peru is a claim belonging to the plaintiff which lies immediately south of the Mount Diablo. Then follow, going north, the Mount Diablo, the Dinero, and lastly, the Mountain Boy, which covers on the surface nearly the same ground as the Dinero.)

Going north from the Peru, that is, across the belt, the experts find a rock which the plaintiff's witnesses name clay slate, and which they insist, notwithstanding some alterations in color and texture, extends from the stratified slate on the south to a belt of greenstone found about two hundred feet north of the Callison claim, or some eight hundred feet from the Peru south line. This rock is, according to the plaintiff's experts, for the most part a decom-

posed clay slate. In many places, and especially near ore bodies, it is white, and without signs of stratification; in other places it becomes a hard and highly silicious rock of a dark brown color, also unstratified, but always, in their opinion, clay slate more or less altered and decomposed, and all a part of the Mount Diablo lode. On the other hand, the experts of the defendants name this prevailing rock in the Mount Diablo, Dinero and Callison claims, felsite porphyry and decomposed felsite porphyry; the former being the dark brown, and the latter the white clay slate of the plaintiff's witnesses.

Except in the names they give the rocks, and that they differ as to the presence of feldspar crystals therein, the witnesses on both sides agree in their description of such rocks as to color, texture and position.

The stratified slate on the south is barren, as is the greenstone to the north. Throughout this belt the ore bodies, the pay ores, have occurred quite irregularly, unless we except the Callison ore body, to be considered further on. The main tunnel of the Mount Diablo followed, for two or three hundred feet, a crack or fissure which Mr. Keyes at first took to be the fissure up through which the metals came to impregnate the neighboring rocks; but later concluded was a rent made after the deposition of the metals.

Along the line of this tunnel, for the first two hundred feet, the paying ores of the Mount Diablo have chiefly been found. From a point at the foot of an incline (No. 2) sunk from this tunnel, which point is near the center of the Mount Diablo claim, a drift, called the "connecting drift," has been run north two hundred and thirty feet to the Callison upper incline and ore body. At a distance of one hundred and fifteen feet from the foot of this incline there is encountered in the drift a belt of rock, called, by some of the witnesses, the "black dyke," which is from twenty-two to thirty feet in thickness. By whatever name called, clay slate or porphyry, it is in every exterior quality presented to the sight or touch a different rock from that adjoining it on each side. About two hundred and fifty feet east of this, in the "blue drift," run from the foot of incline No. 3, a dyke of similar rock is found at a depth considerably greater than in the connecting drift, and appearing, from its position and physical properties, to be the same black dyke found in the connecting drift. This dyke, the defendants claim, is the hanging-wall of the Mount Diablo lode. Assuming it to be continuous between the points exposed in the two drifts, it has a course east and west corresponding to the general course of the ore channels in the Mount Diablo and Callison claims. Going on north in the connecting drift from this dyke, we pass through some decomposed felsite porphyry or slate, some quartz and other rocks, not in place, just under the ravine which runs between the Mount Diablo and the Callison claims, and at ninety feet north of the dyke come to a stratum of dark, hard, flinty rock, which is about six feet thick; lying upon this next comes about fifteen feet of defendants' decomposed feldspathic porphyry, or plaintiff's clay slate, which defendants call their foot-wall. Then comes the Callison ore body, from two to six feet thick, followed by a hanging wall of the white decomposed barren rock, extending on one hundred feet or more to belts of porphyry, greenstone and serpentine. From the Mount Diablo tunnel to the "black dyke," assays taken by Mr. Keyes every ten feet show from \$64.10, in one place twenty feet north of the tunnel, to \$3.77 silver.

The black dyke is practically barren, though traces of silver are shown by some assays. The material passed through is none of it "pay ore," but is called "vein matter."

From the north side of the dyke to the edge of the Callison foot-wall the assays of Mr. Keyes show from \$5.65 to traces of silver. The Callison foot-wall is entirely barren, except that traces of silver may be found on its outermost edges.

The Callison ore channel has been opened one hundred and seventy-seven feet in depth on its dip, and one hundred and eighty-six feet in length on its course or strike; throughout its whole extent the ore has lain on this barren white clay or porphyry, dipping with regularity to the north at an angle of about forty-five degrees. It is from two to six feet thick, and the hanging wall is this white material, before mentioned, extending on north one hundred feet or more. The ore bodies in the Mount Diablo are bounded by decomposed white rock, similar to the foot and hanging walls of the Callison, though no body so large and regular has been found as that in the Callison.

These are the leading facts, and upon them, though the question is not entirely free from doubt, we are inclined to think, and for the purposes of this decision shall assume, that the Callison is a vein or lode separate from the Mount Diablo, within the meaning of those words as used in the acts of congress, and as interpreted in the Eureka Case, 4 Saw., 302 (§§ 139-41, *infra*). In that case it was held that the terms, vein and lode, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

It was considered in that case that the terms vein and lode, as used by congress, for reasons there given, could not be restricted, always, to "aggregations of mineral matter in fissures of rocks"—that is to say, to typical fissure veins—but must be so extended as to include any other aggregation of mineral matter containing ores lying within clearly defined boundaries. Such boundaries were found in that case in the quartzite on the south, and the clay-slate on the north. Between those boundaries, however, no others appeared clearly dividing the included rock or vein matter; and it never was intended in that case to hold that every metalliferous zone of country to which boundaries could be found must be regarded as one vein or lode, for this would be to reduce all mining districts to one lode. Moreover, in this case we look in vain for clearly defined boundaries where the plaintiff claims the boundaries to be. Dr. Blatchley, a witness for plaintiff, says that on the south "the line of demarcation between the stratified slate which contains no mineral, and that which is not so strongly stratified and does contain mineral (meaning gold and silver), is not very clearly defined." Again he says: "There is no distinct or definite line that can be drawn accurately." Mr. Keyes considers the stratified slate as the boundary between the Peru and a claim southwest of it called the "Stump and Adams." This division line is observable on the surface, but he has seen no boundary of unaltered slate below. Both he and Dr. Blatchley consider the south limit of the lode to be where the "impregnation" ends. To the north, where the greenstone is found, the boundary is still less clearly defined. Dr. Blatchley says the line of demarcation between the greenstone and slate "is not plain and clear; . . . to fix it exactly would be very difficult." Again he says, "they (the divisions) are all very vague and indefinite." Beyond the slate claimed to be the boundary on the south ore has been found, increasing the difficulty of fixing the limits of impregnation in that direction.

Looking, then, at this metalliferous zone as a whole, at the point where the claims in question lie, it is impossible to find clearly defined boundaries. There

is, however, such a zone there, and there is, no doubt, a limit beyond which the rocks are not impregnated with silver, which limit is at present not clearly ascertained.

Having such a zone or district, when we find within it fissures like that opened by the Callison, filled with ore, we think we must regard them as veins or lodes. For, while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name lode, true fissure veins found within its limits. We think the Callison claim must be regarded as being upon such a fissure, and as having unmistakable visible boundaries.

We have been unable to feel the importance of determining whether the prevailing rock in these claims shall be called decomposed clay-slate with the plaintiff, or decomposed felsite porphyry with the defendants. Nor do we regard it as a safe guide in determining whether there is one lode or more here, that chemical analysis shows these rocks to be composed of the same ingredients. The same test would require us to pronounce plumbago anthracite coal, and massive diamond to be the same.

In these cases, where visible practical boundaries are the important things, the optical qualities of rocks seem to us a safer guide than chemical analysis. All the witnesses agree that true fissures may exist in this rock, whether slate or porphyry; and, be it what it may, we find at the Callison mine a fissure having foot and hanging walls, dip, strike, and a quite uniform breadth. Judging from exterior appearances, we at once pronounce the brown quartz, the stratified clay-slate, the decomposed material, and the "black dyke," different rocks. To the eye the foot-wall of the Callison mine with its brown, flinty quartz, and overlying clay, is a plain line of demarcation between it and the country rock south of it. For the purposes of this decision, therefore, as before stated, we shall assume the Callison to be a separate vein or lode.

Assuming the Callison to be a separate lode, still the plaintiff claims it under the operation of the mining laws of the Columbus district, by virtue of the Dinero location. Section 8 of those laws reads as follows: "Section 8. Each locator or claimant in any ledge in this district shall be entitled to two hundred (200) feet by location, and all the dips, spurs, angles, offshoots, outcrops, depths, widths and variations, and all the minerals and other valuables therein contained; and the discoverer and locator of any new ledge or lode shall be entitled to one claim of two hundred (200) feet additional for discovery. The locator or locators of any ledge or lode shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals (whether in distinct ledges or otherwise) therein contained."

Under this section the plaintiff contends that when a party locates a given number of feet along a given lode, he holds, by virtue of such location, a hundred feet on each side of his lode without expressly claiming it in his notice; or, in other words, that when a party becomes a locator, he is entitled to hold in that quality the one hundred feet on each side of his lode. The Dinero notice read as follows:

"Notice.—Dinero Quartz Claim, one thousand four hundred feet. We, the undersigned, this 7th day of September, A. D. 1867, locate and claim one thousand four hundred feet (1,400) on this Dinero Quartz Lode, together with all the privileges granted by the laws of this, the Columbus Mining District,

running seven hundred feet each side of this notice. Signed, A. Hanke and five others."

Upon the strength of the claim in this notice of all the privileges granted by the district laws, the plaintiff further contends that if the quantity of surface ground claimed must be put in the notice of location, he has substantially and sufficiently complied with the law.

The requirements of the Columbus mining laws in regard to locating claims are, that "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed;" and further, that "all notices of location shall contain the names of the locators or claimants." There is nothing requiring a marking out of the surface boundaries on the ground.

The construction placed upon the mining laws by the defendants is, that, before a locator becomes entitled to hold this surface ground, he must claim it and give notice of his claim; that the miner cannot hold what he has not claimed, and that it is as essential to locate and claim the surface, and specify the number of feet on each side desired, as the number of feet along the lode. Further, that the claim of "all the privileges," etc., does not help the plaintiff, that claim being too indefinite to be of any validity.

§ 133. *The locator of a mine is entitled to hold one hundred feet on each side of his ledge, although he may have made no distinct claim to side ground.*

After a careful consideration of the language used by the miners, the circumstances under which, and the condition of the district at the time the laws were made, together with the arguments of counsel, we are constrained to hold that the miners meant, by section 8, to say that when a person had become a locator by putting up his stake or mound, and his notice of the number of feet claimed on the lode, with the name of the company and the names of the locators, such person became, by virtue of such location, invested with a right to hold one hundred feet on each side of the lode he had located.

The language is, "the locator of a ledge shall be entitled to hold one hundred feet on each side of his ledge," not that he may locate that quantity of surface ground. This construction gains force from the language which follows, that entitling the locator to one hundred feet on each side of his ledge, viz., "together with all minerals (whether in distinct ledges or otherwise) therein contained." This shows that the one hundred feet were to be held for something more than surface ground for convenience in working the claim. When the miners framed the law, doubts existed, doubts which have not yet been settled, as to the character of the ore deposits in the Columbus district.

Hence this privilege was intended to secure the locator a reasonable quantity of ground, whether his ore deposit should be called a lode or impregnation or "otherwise." It was, as we think, a definition of what a location of feet along a lode or supposed lode should embrace.

But if we admit that there ought to be a claim and notice of the surface ground, aside from the location of the lode itself, then we consider the notice in this case to be a good and valid notice of the claim of Hanke and his co-locators to fourteen hundred feet along the Dinero lode, and to one hundred feet on each side of that lode.

If it is necessary to express in terms the number of feet the locator intends to claim on each side of the lode, would it not be equally necessary to claim in distinct, express terms, all the dips, spurs and angles of the lode which the

mining law gives to the locator? We presume it would not be insisted that the locator should not be permitted to follow the dip of his lode outside his surface lines unless he had expressed his intention to claim that right in terms. Yet the right to dips, spurs, etc., is given by the mining law in the same terms as the right to one hundred feet on each side of the lode.

The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably should be held a good notice. Great injustice would follow, if, years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism.

We agree with the defendants that the locator should make his location so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear that, when they shall have found a paying mine, the theretofore indefinite lines of some prior location may be made to embrace it.

But *id certum est quod certum reddi potest*. When the miner has stated, as the rules require, the number of feet he claims along the lode on which he has set his stake, and has referred all whom it may concern to the laws of the district, by claiming all the privileges granted by the laws of the district, and those laws, in express terms, entitle each locator to hold one hundred feet on each side of his lode, then the length and breadth of his claim are fixed with reasonable certainty, because, by reading the laws of the district, with the notice referring him to them, the subsequent locator can make certain the exact thing claimed. See *Katie Gleeson v. Martin White Mining Company*, 13 Nev., 442.

It is true that a locator might, if he desired, take less than the one hundred feet, but in this case Hanke and his associates did claim all the law allowed. And, after all, is it not the gist of the whole matter that the miner actually takes possession and goes to work, thus giving publicity to his claim? That was done in this case. Plaintiff and its grantors have been on this ground, claiming it, prospecting and working it for years. The defendants cannot claim to have been misled by the notice in this case, for when they located the Mountain Boy, in February, 1878, they knew it was upon the Dinero claim, but insisted that the Dinero, for lack of the required amount of work upon it, had been forfeited.

Besides all this, in March, 1876, almost two years before the defendants located the Mountain Boy, the plaintiff had made a survey, and staked off the exterior boundaries of what it claimed beyond all chance of mistake. This was done by placing stakes as follows: One at the center, one at the east and one at the west end of the center line of the Mount Diablo claim; one three hundred feet north and one three hundred feet south of both the east and west center stakes, thus plainly marking the center line and the four corners of ground claimed by the plaintiff, under the three locations made by Hanke and his associates. The Mountain Boy claim is almost wholly located within the lines marked by these stakes, and the ore body opened by the Callisons has its apex eighty-seven feet south of plaintiff's north line as thus marked.

We think the plaintiff, under the mining law quoted, became entitled to hold one hundred feet on each side of the Dinero lode by virtue of the original location, unless, as is further urged by defendants, this section 8 was void for conflict with the act of congress of 1866. 14 Stat., 251. It does not ap-

pear to us necessary, at this day, to decide the effect of the act of 1866, upon locations made after its passage and before the act of 1872. We think it by no means certain that the act of 1866 confined locations so that surface ground could not have been taken up, embracing more than one lode, although it is true that a patent under that act could have issued but for one lode.

§ 134. *Construction of the mining act of 1872.*

For, be this as it may, the act of 1872 (17 Stat., 91; R. S., sec. 2322) recognizes locations made prior to its passage, the surface lines of which included more than one vein or lode. The language is: "The locators of all mining locations heretofore made . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes or ledges, the top or apex of which lies inside such surface lines." . . .

It is very clear that this language reaches the case of locators who had located claims while the act of 1866 was in force, the surface lines of which included the tops of more than one lode, and confirms their possession to all the surface, and all the lodes included within their lines. That is the case at bar. The top or apex of the Callison lode lies within the surface lines of the Dinero, and within forty-seven and a half feet of the location monument which Hanke placed on the Dinero croppings; and it follows that the plaintiff is entitled to the exclusive possession of the Callison lode, unless, for non-compliance with the law, a forfeiture of the Dinero claim has been incurred.

The evidence altogether refutes the idea that there was any abandonment in fact, or any intention to abandon, the Dinero claim on plaintiff's part. There can be no doubt, from the evidence, that sufficient work was done on the Dinero claim to hold it down to 1876 and 1877. But however that may be, it is conceded that, under the statute, if sufficient work was done during the year 1877 to hold it, then there was no forfeiture. The whole question, therefore, on this branch of the case, is whether, in the year 1877, one hundred and forty dollars' worth of labor was performed, or improvements made, on the Dinero claim. If not, the claim was subject to relocation in February, 1878, by defendants; otherwise not.

On this point we find that a road was made during the year 1877 over the surface of the Dinero and Mount Diablo to be used in working the three mines, the Peru, Mount Diablo and Dinero, all at this time owned by the plaintiff, and to reach the Mount Diablo ore dump and the point on the surface of the Dinero, where the winze in the connecting drift would come out when raised as was then proposed. That portion of the labor on this road done on the surface of the Dinero claim was worth from fifty to seventy-five dollars.

A survey was also made to locate the point where the winze, when raised, would come to the surface, a point within the surface lines of the Dinero. In this year, Mr. Sweetapple located for plaintiff a proposed shaft at the point "R" on the Dinero ground, north of the ravine, and beyond the apex of the Callison vein. This projected shaft was to be a two-compartment shaft, and was to be sunk for prospecting the Dinero ground. An advertisement for bids was made, and six or eight were put in. The shaft was not begun in 1877, because, as Mr. Sweetapple testifies, the company, being short of funds, decided to postpone sinking it until the following year.

All this was done on the surface of the claim; but it does not distinctly appear that the worth of it was so much as \$140. It is evidence, however, of a

continued purpose to hold the Dinero ground, and tends to confirm the claim of plaintiff, that all the work performed in this connection was intended to be applicable to all these three claims.

The plaintiff further shows that, in prosecuting work from the main tunnel, which tunnel begins on the Mount Diablo ground, such as drifting and stoping out ore, some three thousand dollars' worth of labor was done during this year within the surface lines of the Dinero, if those lines are dropped perpendicularly down. This, the defendants say, was not, properly speaking, work on the Dinero claim, but within and on the Mount Diablo lode, which, in its downward course, has pitched into the Dinero. The plaintiff, on the other hand, also insists that this and all other work was a part of a systematic plan applicable to all their claims.

This presents a question of practical importance for decision, which the consideration of a few additional facts may help us to do correctly. In the year 1867, the grantors of plaintiff Hanke and his associates located three quartz claims at the point now in question, viz., the Peru, Mount Diablo and Dinero, all lying side by side, with the Mount Diablo in the center, the Dinero being the first location. The surface of each claim was two hundred feet wide. The plaintiff and its predecessors, from that time on, have been in the undisturbed possession of the mining ground covered by these three claims. During the years from 1867 to 1878, when the defendant entered, a large amount of work had been done by the plaintiff in and upon the claims, consisting of tunnels, drifts, winzes, cross-cuts, inclines, ore stopes, and all the labor usual in the development of such a mining claim. Over \$94,000 have been expended by the plaintiff on the claims; much the larger portion within the lines of the Mount Diablo claim.

When Hanke located these three claims he first located the Dinero, putting up a mound on the croppings; then going south he located next the Mount Diablo, and last the Peru, putting a notice on the croppings of each. The three claims adjoin each other, and the surface area of the three together is just what the law of 1872 permits a locator to take on locating a single lode, unless the mining laws restrict him, namely, three hundred feet on each side of the center of the Mount Diablo claim. The Columbus laws do restrict the locators to one hundred feet on each side of the ledge located. At the time Hanke made his discovery and locations, he found upon the surface of all three claims black iron and manganese croppings. Ignorant of the real character of the ore deposits he believed he had found, and it being impossible, in the absence of developments beneath the surface, to determine whether these croppings were the signs of one lode or more, he made three locations. This he had a right to do. It was no more than any careful miner desiring to secure the fruits of his discovery would have done. Subsequent explorations have shown that valuable ore deposits exist in each of the claims so located.

The mining law, providing for the peculiar mode in which the metalliferous deposits occur in the Columbus district, gave the locator a right to stick his stake at the point he supposed and claimed his ledge to be, and then entitled him to hold one hundred feet on each side, with all the ores and metals therein, thereby, in some degree, protecting the locator upon newly-discovered croppings, against his liability to mistake in selecting the spot to place his stake and notice.

These three claims, so located, the plaintiff has held and worked for more than ten years. The main tunnel, starting in the Mount Diablo, bears north

until it penetrates the Dinero ground about one hundred and fifty feet. From this tunnel cross-cuts have been run south into the Peru and north into the Dinero, *i. e.*, across the line dividing on the surface the Mount Diablo and Dinero claims.

Sometime in the year 1876 a cross-cut was made, north about forty-three feet towards the Dinero claim, some two hundred feet from the mouth of the main tunnel. From the north end of this cross-cut an incline was sunk, the same year, one hundred and forty-three feet, bringing the foot of the incline more than fifty feet into the Dinero ground. In 1877 drifting and stoping were carried on from and about this incline, and, according to Mr. Sweetapple, and the fact is not disputed, at least three thousand dollars' worth of this work was done on the Dinero, north of the Mount Diablo north line. A little north of the foot of this incline a cross-cut from the drift running north was run, in 1877, twelve or fifteen feet west, at a cost of over \$144. This cross-cut is wholly in the Dinero ground as marked on the surface.

This is the substance of the testimony on this point, and upon it we are called upon to decide whether the plaintiff, in the year 1877, failed to comply with the conditions, as to labor on the Dinero claim, stated in section 2324 of the Revised Statutes, thereby leaving that claim open to relocation.

§ 135. "*Mining claim*" defined under the act of 1872.

What, then, is a "mining claim," and what is "work on a claim?" It may be answered, to the first part of the inquiry, that a "mining claim" is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must, under the law of congress of 1872 (R. S., sec. 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim.

"No claim," says the act, "shall extend more than three hundred feet on each side of the middle of the vein at the surface." A claim may therefore, if there is no restriction in the local rules, be six hundred feet wide, although the known lode to include which such claim is located is not twelve inches in width. The owners of such a mining claim have, in the language of the law, "the exclusive right and enjoyment of all the surface included within the lines of their locations." R. S., sec. 2322.

§ 136. What is "*work on a claim*."

Applying the law to the case in hand, the Dinero claim consists of a tract of mining ground fourteen hundred feet long and two hundred feet wide. The Mount Diablo Company being the owner of the claim, had, in 1877, the exclusive right of possession to the whole tract, so far as the surface is concerned. Below the surface the possession was subject to such right as was given by statute to the owner of an adjoining claim to follow his lode downward across his line into the Dinero ground. Assuming this definition of a mining claim to be correct, the second branch of our inquiry is easily answered; work on a claim is work done anywhere within the lines upon the surface, and anywhere within those lines below the surface, when they are carried down vertically into the earth.

Had the Dinero ground been owned by another than plaintiff, and had this three thousand dollars' worth of work been done by such other owner at the point where it was in fact done by plaintiff, there could not be, it seems to us, any pretext for claiming a forfeiture against the Dinero owners on the ground that the work done, though on the claim, turned out to be within a lode

which had its apex outside the Dinero surface lines. We think the fact that the plaintiff was the owner of both the Mount Diablo and Dinero claim ought not to deprive it of credit for this work done on the Dinero. It is literally and in fact work done on the Dinero claim. If an outside lode dip into the claim, the work may also be done inside of that lode, but at the same time on the Dinero claim. A mining claim, as we have seen, is not merely the vein or lode, but that with a certain quantity of surface ground. The owner has the exclusive right of possession to such surface, as well as to the veins or lodes cropping out therein.

When the owner of a vein having its top outside the lines of such claim follows his vein into an adjoining claim, he does so by permission of a positive law, without which he would have no more right to go upon his neighbor's claim below than upon the surface. It is a sort of easement in, or servitude laid upon, the mining claim adjoining. We therefore conclude that when a miner does the necessary labor anywhere within his boundaries, upon the surface or below it, the condition of the mining law as to labor has been complied with. We cannot hold that he shall make no mistakes; that he is bound to ascertain, at the risk of forfeiture, whether he is working on a lode having its apex outside his surface lines. The miner has perils and perplexities enough, without adding this. The ten dollars' worth of labor which the law requires the plaintiff to do on each one hundred feet of the Dinero claim, to save it from forfeiture, is too small to be of any practical consequence as a development of the claim. Congress plainly required this work to be done by way of a continuous, annual assertion or renewal of the original claim and location, and nothing more. This being so, it would hurt our sense of justice did we feel compelled to say that one hundred and forty dollars' worth of labor done on the surface, utterly valueless as a development of the claim, would have saved the claim from forfeiture, and that the three thousand dollars' worth of work done below the surface cannot.

It is also to be remembered that the plaintiff had long been the owner and possessor of these three claims; that the precise limits of the lodes, if more than one, and the nature of the ore deposit was, and may still be said to be, by no means free from doubt. A long tunnel was driven into this ground; a drift off to the south was run to prospect the Peru; on the north side inclines were sunk, and drifts run, some extending into the Dinero, some not. Wherever, in the Peru, Mount Diablo or Dinero, promise of ore appeared, there work was done, and when found the ore was stoped out.

At two different times, the last in 1874, notices were put up, and one of them recorded, notifying all that the work then being done was intended for the development of the three claims.

§ 137. *Effect of "work outside of a claim" as to securing the claim from forfeiture.*

Work done outside of the claim or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.

A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by

plaintiff. And we think that all work done was a part of that general system, and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. Under the circumstances of this case it would be little short of downright absurdity to require the plaintiff to segregate his work, and proclaim the labor of removing one wheelbarrow full of earth from the common tunnel to be specifically applicable to the Dinero claim; another to the Mount Diablo, and a third to the Peru. The natural and reasonable presumption is that all the work is done as a part of the system, and as such applicable to all the claims.

§ 188. *Forfeitures not to be favored.*

Finally, when we consider that the plaintiff had been in unquestioned occupation of all these claims for over ten years prior to the entry of defendants, and the amount of labor altogether done on the ground, we have no inclination, and do not deem it our duty, to strain for a construction of the law or of the facts upon which to declare a forfeiture. Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. Our conclusion is that the plaintiff is entitled to the possession of the demanded premises.

Judgment must accordingly be entered in favor of plaintiff.

EUREKA CONSOLIDATED MINING COMPANY v. RICHMOND MINING COMPANY.

(Circuit Court for Nevada: 4 Sawyer, 302-326. 1877.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is an action for the possession of certain mining ground, particularly described in the complaint, situated in Eureka mining district, in the county of Eureka, in the state of Nevada. The plaintiff is a corporation created under the laws of California, and the defendant, the Richmond Mining Company, is a corporation created under the laws of Nevada. The other defendants, Thomas Wren and Joseph Potts, are citizens of the latter state. The action was originally commenced in a state court of Nevada, but upon application of the plaintiff, and upon the ground of its incorporation in another state, and the presumed citizenship, from that fact, of its corporators or stockholders in that state, it was transferred to the circuit court of the United States. The complaint in the state court, in addition to the usual allegations of a declaration in ejectment, set forth various grounds upon which was based a prayer for an order restraining the defendants from working the premises in controversy pending the action. The defendants, in their answer to the complaint, not only denied the title of the plaintiff, but made various averments upon which a like restraining order against the plaintiff was asked. Both orders were granted. This union of a demand in ejectment for the property in controversy, with a prayer for provisional equitable relief, is permitted by the system of procedure which obtains in the state courts, thus saving the parties the necessity of litigating in two suits what can as readily and less expensively be accomplished in one. But this union is not permitted in the federal courts; and upon the transfer of the present action, the pleadings of the plaintiffs were amended by substituting a regular complaint in ejectment on the law side of the court; and a bill was filed for an injunction on its equity

side. The defendants answered both, and also filed a cross-bill for an injunction against the plaintiff.

By arrangement of the parties, the defendants, Messrs. Wren and Potts, are dropped out of the controversy, and their names may be stricken from the pleadings. The claim for damages is also waived in this action, without prejudice to any future proceedings with respect to them. By stipulation, the case at law — the action of ejectment — is tried by the court without the intervention of a jury, and the judges sit at San Francisco instead of Carson, their finding and judgment to be entered in term time in the latter place as though the case were heard and decided there. The testimony taken in the action at law is to be received as depositions in the equity suit, and both cases are to be disposed of at the same time, to the end that the whole controversy between the parties may be settled at once.

The premises in controversy are of great value, amounting, by estimation, to several hundred thousands of dollars, and the case has been prepared for trial with a care proportionate to this estimate of the value of the property; and the trial has been conducted by counsel on both sides with eminent ability.

Whatever could inform, instruct or enlighten the court has been presented by them. Practical miners have given us their testimony as to the location and working of the mine. Men of science have explained to us how it was probable that nature in her processes had deposited the mineral where it is found. Models of glass have made the hill, where the mining ground lies, transparent, so that we have been able to trace the course of the veins and see the chambers of ore found in its depths. For myself, after a somewhat extended judicial experience, covering now a period of nearly twenty years, I can say that I have seldom, if ever, seen a case involving the consideration of so many and varied particulars, more thoroughly prepared or more ably presented. And what has added a charm to the whole trial has been the conduct of counsel on both sides, who have appeared to assist each other in the development of the facts of the case, and have furnished an illustration of the truth that the highest courtesy is consistent with the most earnest contention.

The mining ground which forms the subject of controversy is situated in a hill known as Ruby Hill, a spur of Prospect Mountain, distant about two miles from the town of Eureka, in Nevada. Prospect Mountain is several miles in length, running in a northerly and southerly course. Adjoining its northerly end is this spur called Ruby Hill, which extends thence westerly, or in a southwesterly direction. Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone, in which, at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains. And our principal inquiry is to ascertain the character of this zone, in order to determine whether it is to be treated as constituting one lode, or as embracing several lodes, as that term is used in the acts of congress of 1866 and 1872, under which the parties have acquired whatever rights they possess. In this inquiry, the first thing to be settled is the meaning of the term in those acts. This meaning being settled, the physical characteristics and the distinguishing features of the zone will be considered.

§ 139. *What are veins and lodes as used in mining acts of congress.*

Those acts give no definition of the term. They use it always in connection with the term vein. The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or, more accurately, as aggregations of mineral matter containing ores in fissures. See Von Cotta's *Treatise on Ore Deposits*, Prime's Translation, 26. But miners used the term before geologists attempted to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the general government as commissioner of mining statistics, and in that capacity had occasion to examine and report upon a large number of mines in the states of Nevada and California, and the territories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overridden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners before being defined by any authority, the term lode simply meant that formation by which the miner could be led or guided. It is an alteration of the verb lead, and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode." The term lode-star, guiding-star or north star, he adds, is of the same origin. Cinnabar is not found in any fissure of the earth's crust, or in any lode as defined by geologists, yet the acts of congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of lode, as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any of them. Those acts were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms vein and lode in connection with each other in the act of 1866, and their use in connection with the term ledge in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts which a scientific definition of any of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition

of a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms and appearing to have been created by the same processes.

Examining now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness; and on its north side, for a like extent, by a belt of clay or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam, less than an inch in width. From that point they diverge, until on the surface in the Eureka mine they are about five hundred feet apart, and on the surface in the Richmond mine about eight hundred feet. The quartzite has a general dip to the north at an angle of about forty-five degrees, subject to some local variations as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface, these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked they are now only from two to three hundred feet apart.

The limestone found between these two limits — the wall of quartzite and the seam of clay or shale — has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of men of science to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If, in some isolated places, there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

In this zone of limestone, numerous caves or chambers are found, further

distinguishing it from the neighboring rock. The limestone being broken and crushed up as stated, the water from above readily penetrated into it, and, operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing, such action from the water above.

Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

This broken, crushed and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner, an individuality, a oneness as complete as that which the most perfect lode, in a geological sense, ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone.

Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would, therefore, naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffuse to justify giving to the limestone the general designation of mineralized matter — metal-bearing rock. The three scientific experts produced by the plaintiff, Mr. Keyes, Mr. Raymond and Mr. Hunt, all of them of large experience and extensive attainments, and two of them of national reputation, have given it as their opinion, after examining the ground, that the zone of limestone between the quartzite and the shale constitutes one vein or lode, in the sense in which those terms are used by miners. Mr. Keyes, who for years was superintendent of the mine of the plaintiff, concludes a minute description of the character and developments of the ground, by stating that, in his judgment, according to the customs of miners in this country and common sense, the whole of that space should be considered and accepted as a lead, lode or ledge of metal-bearing rock in place.

Dr. Raymond, after giving a like extended account of the character of the ground, and his opinion as to the causes of its formation, and stating with great minuteness the observations he had made, concludes by announcing as his judgment, after carefully weighing all that he has seen, that the deposit between the quartzite and the shale is to be considered as a single vein in the sense in which the word is used by miners,— that is, as a single ore deposit of identical origin, age and character throughout.

Dr. Hunt, after stating the result of his examination of the ground and his theory as to the formation of the mine, gives his judgment as follows: "My conclusion is this: that this whole mass of rock is impregnated with ore; that although the great mass of ore stretches for a long distance above horizontally and along an incline down the foot-wall, as I have traced it, from this deposit you can also trace the ore into a succession of great cavities or bonanzas lying irregularly across the limestone and into smaller caverns or chasms of the same sort; and that the whole mass of the limestone is irregularly impregnated with the ore. I use the word impregnation in the sense that it has penetrated here and there; little patches and stains, ore-vugs and caverns and

spaces of all sizes and all shapes, irregularly disseminated through the mass. I conclude, therefore, that this great mass of ore is, in the proper sense of the word, a great lode, or a great vein, in the sense in which the word is used by miners; and that practically the only way of utilizing this deposit is to treat the whole of it as one great ore-bearing lode or mass of rock."

This conclusion as to the zone constituting one lode of rock-bearing metal, it is true, is not adopted by the men of science produced as witnesses by the defendant, the Richmond Company. These latter gentlemen, like the others, have had a large experience in the examination of mines, and some of them have acquired a national reputation for their scientific attainments. No one questions their learning or ability, or the sincerity with which they have expressed their convictions. They agree with the plaintiff's witnesses as to the existence of the mineralized zone of limestone with an underlying quartzite and an overlying shale; as to the broken and crushed condition of the limestone, and substantially as to the origin of the metal and its deposition in the rock. In nearly all other respects they disagree. In their judgment, the zone of limestone has no features of a lode. It has no continuous fissure, says Mr. King, to mark it as a lode. A lode, he adds, must have a foot-wall and a hanging-wall, and if it is broad, these must connect at both ends, and must connect downward. Here there is no hanging-wall or foot-wall; the limestone only rests, as a matter of stratigraphical fact, on underlying quartzite, and the shale overlies it. And distinguishing the structure at Ruby Hill from the Comstock lode, the same witness says that the one is a series of sedimentary beds laid down in the ocean and turned up; the other is a fissure extending between the rocks.

The other witnesses of the defendant, so far as they have expressed any opinion as to what constitutes a lode, have agreed with the views of Mr. King. It is impossible not to perceive that these gentlemen at all times carried in their minds the scientific definition of the term as given by geologists, that a lode is a fissure in the earth's crust filled with mineral matter, and disregarded the broader, though less scientific, definition of the miner who applies the term to all zones or belts of metal-bearing rock lying within clearly marked boundaries. For the reasons already stated, we are of opinion that the acts of congress use the term in the sense in which miners understand it.

If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct veins existing in distinct fissures of the limestone would be not only plausible, but reasonable; for that definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition cannot be accepted, and the zone presents the case of a lode as that term is understood by miners, the theory of separate veins, as distinct and disconnected bodies of ore, falls to the ground. It is, therefore, of little consequence what name is given to the bodies of ore in the limestone, whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses, they are but parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond, inclusive.

The acts of congress of 1866 and 1872 dealt with a practical necessity of miners; they were passed to protect locations on veins or lodes, as miners understood those terms. Instances without number exist where the meaning of

words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the supreme court of the United States, singing birds were held not to be live animals, within the meaning of a revenue act of congress. *Reiche v. Smythe*, 13 Wall.; 162. And in a previous case, arising upon the construction of the Oregon donation act of congress, the term a single man was held to include in its meaning an unmarried woman. *Silver v. Ladd*, 7 Wall., 219. If any one will examine the two decisions, reported as they are in Wallace's Reports, he will find good reasons for both of them.

Our judgment being that the limestone zone in Ruby Hill, in Eureka district, lying between the quartzite and the shale, constitutes, within the meaning of the acts of congress, one lode of rock-bearing metal, we proceed to consider the rights conveyed to the parties by their respective patents from the United States. All these patents are founded upon previous locations, taken up and improved according to the customs and rules of miners in the district. Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land-office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the system established for the alienation of the public lands, the patent is the consummation of a series of acts, having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property. As was said by the supreme court in the case of *Shepley v. Cowan*, 1 Otto, 338, where two parties are contending for the same property, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

§ 140. *Mode of making objections to patent for mining claim. Doctrine of relation does not apply. What is a waiver.*

But this principle has been qualified in its application to patents of mining ground by provisions in the act of 1872 for the settlement of adverse claims before the issue of the patent. Under that act, when one is seeking a patent for his mining location and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase from the state, as in the case of *Heydenfeldt v. Daney Gold Mining Company*, reported in the third of Otto, the doctrine cannot be applied so as to cut off the rights of the earlier patentee,

under a later location, where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority.

But from the view we take of the rights of the parties under their respective patents, and the locations upon which those patents were issued, the question of priority of location is of no practical consequence in the case.

§ 141. *Construction of provision as to parallel lines in act of 1872.*

The plaintiff is the patentee of several locations on the Ruby Hill lode, but for the purpose of this action it is only necessary to refer to three of them — the patents for the Champion, the At Last, and the Lupita or Margaret claims. The first of these patents was issued in 1872, the second in 1876, and the third in 1877. Within the end lines of the locations, as patented, in all these cases, when drawn down vertically through the lode, the property in controversy falls. Objection is taken to the validity of the last two patents, because the end lines of the surface locations patented are not parallel, as required by the act of 1872. But to this objection there are several obvious answers. In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations was not required. The presumption of the law is, that the officers of the executive department, specially charged with the supervision of applications for mining patents and the issue of such patents, did their duty; and in an action of ejectment, mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. In the second place, the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the government has the right to complain.

The defendant, the Richmond Mining Company, also holds several patents issued to it upon different locations; but in this case it specially relies upon the patents of the Richmond and Tip-top claims. It is alleged that these patents were issued upon locations made earlier than any upon which the patents to the plaintiff were issued. Assuming this to be the fact, and claiming from it that the patents, by relation back to such locators, antedate in their operation the patents of the plaintiff; and the further fact that the locations were made under the act of 1866, the defendant relies, upon the facts assumed, to defeat the pretensions of the plaintiff. It contends that, inasmuch as the croppings of the vein it works are within the surface of its patented locations, it can follow the vein wherever it leads, though it be outside of the end lines of the locations when vertically drawn down through the lode. Its position is that whenever, under the law of 1866, a location was made on a lode or vein, a right was acquired to follow the vein wherever it might lead, without regard to the end lines of the location. This position is urged with

great persistence by one of the counsel of the defendant, and with the ability which characterizes all his discussions.

The second section of the act of 1866, upon the provisions of which this position is based, provides: "That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same according to local customs or rules of miners in the district where the same is situated, and having expended, in actual labor and improvements thereon, an amount of not less than \$1,000, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It will be seen by this section that, to entitle a party to a patent, his claim must have been occupied and improved according to the local customs or rules of miners of the district, and that his diagram of the same, filed in the land-office, in its extension laterally or otherwise, must be in conformity with them.

The rules of the miners in the Eureka mining district, adopted in 1865—laws of the district, as they are termed by the miners—provided that claims of mining ground should be made by posting a written notice on the claimant's ledge, defining its boundaries, if possible; that each claim should consist of two hundred feet on the ledge, but claimants might consolidate their claims by locating in a common name, if, in the aggregate, no more ground was claimed than the two hundred feet for each name, and that each locator should be entitled to all the dips, spurs and angles connecting with his ledge; and that a record of all claims should be made within ten days from the date of location. The rules also allowed claimants to hold one hundred feet each side of their ledge for mining and building purposes, but declared that they should not be entitled to any other ledge within this surface.

It will be perceived by these rules that they had reference entirely to locations of claims on ledges. It would seem that the miners of the district then supposed that the mineral in the district was only found in veins or ledges, and not isolated deposits. In February, 1869, new rules were added to those previously passed, authorizing the location of such deposits. These new rules provided that each deposit claim should consist of one hundred feet square, and that the location should take all the mineral within the ground to any depth.

Under these rules, square locations and linear locations were made by parties, through whom the defendant derives title, on what is called the Richmond ledge, and linear locations were made on what is called the Tip-top ledge, with surface locations for mining purposes, both parties claiming with their locations all dips, spurs and angles. It is only of the linear locations we have occasion to speak; it is under them that the defendant asserts title to the premises in controversy.

Now, as neither the rules of miners in Eureka mining district nor the act of 1866, in terms, speak of end lines to locations made on ledges, nor in terms

impose any limitation upon miners following these veins wherever they may lead, it is contended that no such limitation can be considered as having existed and be enforced against the defendant. The act of 1866, it is said, recognizes the right of the locator to follow his vein outside of any end lines drawn vertically down when it permits him to obtain a patent granting his mine, "together with the right to follow such vein or lode with its dips, angles and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so

to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass.

As the act of 1866 requires the applicant for a patent to file in the local office a diagram of his claim, such diagram must necessarily present something more than the mere linear location. It is intended that it should embrace the surface claimed for the working of the mine. In this way each of the patents of the parties embraces one or more acres and the fraction of an acre of surface ground and some hundred linear feet on the lode.

The act of 1872 preserves to the miner the rights acquired under the act of 1866, and confers upon him additional rights. Under the act of 1866 he could only hold one lode or vein, although more than one appeared within the lines of his surface location. The surface ground was allowed him for the convenient working of the lode or vein located, and for no other purpose; it conferred no right to any other lode or vein. But the act of 1872 alters the law in this respect; it grants to him the exclusive right of possession to a quantity of surface ground not exceeding a specified amount, and not only to the particular lode or vein located, but to all other veins, lodes and ledges the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth. But these additional rights are granted subject to the limitation that, in following the veins, lodes or ledges, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other. The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines.

Our opinion, therefore, is that both the defendant and the plaintiff, by virtue of their respective patents, whether issued upon locations under the act of 1866, or under the act of 1872, were limited to veins or lodes lying within planes drawn vertically downward through the end lines of their respective locations; and that each took the ores found within those planes at any depth in all veins or lodes, the apex or top of which lay within the surface lines of its locations.

The question of priority of location is therefore, as already stated, of no practical importance in the case. This question can only be important where the lines of one patent overlap those of another patent. Here neither the plaintiff nor defendant could pass outside of the end lines of its own locations, whether they were made before or after those upon which the other party relies. And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented locations, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

The same conclusion would be reached if we looked only to the agreement of the parties made on the 16th of June, 1873. At that time the plaintiff owned the patented claim called the Lookout claim, adjoining on the north the Richmond claim. The defendant had worked down from an incline in

the Richmond and Tip-top into the ore under the surface lines of the Lookout patent. The plaintiff thereupon brought an action for the recovery of the ground and the ores taken from it. A compromise and settlement followed which are contained in an agreement of that date, and were carried out by an exchange of deeds. A map or plat was made showing the different claims held by the two parties. A line was drawn upon this map, on one side of which lay the Champion, the At Last and the Margaret claims, and on the other side lay the Richmond and the Lookout claims. By the agreement of the parties, the plaintiff, on the one hand, was to convey to the defendant the Lookout ground, and also all the mining ground lying on the northwesterly side of the line designated, with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same, and to dismiss all pending actions against the defendant; and on the other hand, the defendant was to pay to the plaintiff the sum of \$85,000, and to convey, with warranty, against its own acts, all its right, title or interest in and to all the mining ground situated in the Eureka mining district on the southeasterly side of the designated line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same. "It being," says the agreement, "the object and intention of the said parties hereto to confine the workings of the party of the second part (the Richmond Mining Company) to the northwesterly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The deeds executed between the parties the same day were in accordance with this agreement. The deed of the Richmond Mining Company to the plaintiff conveyed all the mining ground lying on the southeasterly side of the designated line, "together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed."

The line thus designated extended down in a direct line along the dip of the lode would cut the Potts chamber, and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and the Champion were vein or lode claims, a line dividing them must be extended along the dip of the vein or lode so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them if such were not the case. The plaintiff would, therefore, be the owner of the ground in dispute by the deed of the defendant, even if it could not assert such ownership solely upon its patented locations. Our finding, therefore, is for the plaintiff, and judgment must be entered thereon in its favor for the possession of the premises in controversy. (a)

SLAVONIAN MINING COMPANY v. VACAVICH.

(Circuit Court for Nevada: 7 Sawyer, 217-224. 1881.)

Opinion by HILLYER, J.

STATEMENT OF FACTS.—This is an action to recover a mining claim in Columbus mining district, Nevada. A jury has been waived by written stipula-

(a) Affirmed in *Richmond Mining Co. v. Eureka Mining Co.*,* 13 Otto, 839.

tion. It is submitted to the court mainly upon an agreed statement of facts — the only disputed facts being in regard to the plaintiff's excuse for not doing work in 1880, after the claim was forfeited under the mining laws of the United States.

§ 142. *Construction of statute. Effect of amendment of January 22, 1880, to section 2324, Revised Statutes.*

It is agreed that no work was in fact done on the claim by the plaintiff after October, 1878. The claim was originally located January 3, 1876. January 22, 1880, congress amended the mining law by adding the following words to section 2324 of the Revised Statutes: "*Provided*, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the 1st day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the 10th day of May, *anno Domini*, 1872." It was argued that this proviso gave the plaintiff the whole of the year 1880 in which to do work, although none had been done in 1879.

The object of this proviso was to make one uniform period for the annual work on all claims located since May 10, 1872, and fixed the 1st of January next succeeding the date of location as the time of its commencement. A claim located, as this was, January 3, 1876, would not require any labor to be done on it, under this proviso, before December 31, 1877. Before the proviso work had to be done by January 2, 1877. But in this case no question is made as to the work being done up to January 3, 1880. The last work, done in October, 1878, held the claim until January 3, 1879. As the law then stood, work was required before January 3, 1880, and not having been done, the claim was forfeited unless work was resumed, as the law provided.

The law of January 22, 1880, did not, in my judgment, act retrospectively, and its first application to the plaintiff's claim would have been January 1, 1881. Claims located prior to May 10, 1872, had already been provided for, by extending the time for the annual expenditure thereon to January 1, 1875. 18 Stat., 61. By applying the law of January 22, 1880, to all claims located since May 10, 1872, all cases were provided for and a rule for all annual expenditures established uniform with the calendar year. This is the view of the general land office, and is undoubtedly correct. Sickels' Mining Laws and Decisions, 1881, pp. 392, 393.

§ 143. *When a relocation is ineffectual.*

Thus there was no forfeiture of the plaintiff's claim until January 3, 1880. In September, 1879, the defendant, Samuel Vacavich, relocated this claim. This, it is admitted, was a premature location, but it is claimed by the defendants to have been validated after January 3, 1880, by the failure to do the annual work, on the part of plaintiff. But this, in my judgment, is a wrong view.

Vacavich, before January 3, 1880, was a trespasser, and could not lay the foundation of any valid claim to this mine before that date. Until then, the plaintiff was not in default, and its ground was not subject to relocation for the failure to do the annual work. It would never do to permit an entry upon a mining claim before the owner of it was in default, for the purpose of making a provisional location, to be valid or worthless according as the owner failed or not to do the annual work subsequently. The Vacavich location was a mere nullity.

On March 19, 1880, Mr. Koeneke, president of the plaintiff, by authority of

the company, went to Candelaria to do the annual work, and it is admitted that at this time the claim was forfeited and subject to relocation, and that unless what was done by Mr. Koeneker in March, and by Mr. Harpham in June following, amounted to a resumption of work on the claim, there can be no recovery.

The provision of section 2324 of the Revised Statutes is, that "the claim or mine upon which such failure [to work] occurred shall be open to relocation *in the same manner as if no location of the same had ever been made*, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location."

§ 144. *Resumption of work must be actual, or a bona fide attempt to resume must be made.*

Mr. Koeneker testifies that he visited the mine March 19, 1880, and that it is situated about a mile from the town of Candelaria. About half way between the mine and Candelaria he met Thomas Perasich, one of the defendants, and told him he was going to do the annual work on the mine; that Perasich then told him that he was the sole owner of the mine, and could not permit any one to work on it; that he would shoot any one who attempted to work; and that he did not do any work on the mine because he was threatened with shooting.

It does not appear that Perasich did in fact offer any violence, or that he prevented Mr. Koeneker from going on to the mine. Mr. Koeneker states further that he did go on out to the mine, and finding a padlock on the door of the tunnel, abandoned the idea of work.

Mr. Harpham testified that he was sent down by the board of directors in June, 1880, as agent and attorney at law; that before going to Candelaria he stopped in Carson and commenced this suit, taking the summons along to be served in case he was not allowed to do the annual work on the mine for the year; that on his arrival at Candelaria he made inquiries touching the locality of the mine, and went out to it, or in its vicinity. He says, on cross-examination, he does not know whether he was on the claim or within a quarter of a mile of it, but he saw the mouth of the tunnel closed up. He further testifies, that without attempting to do any work, although in no way molested, he next sought the defendants, and sought permission of Thomas Perasich to work, before trying to do any; that he found Thomas Perasich at the Tilden mine, some ten or twelve miles from Candelaria, and at that distance from the mine, told him he had come down to do the annual work for the year; that Perasich then told him that the mine was his, and he was in possession, and would blow the top of anybody's head off who tried to do work on the claim for plaintiff; that the deputy marshal was with him, and upon this he had him serve the summons. He also testifies that from what he heard about Candelaria, he did not think it would be safe to try to work.

This is a favorable statement of the evidence for the plaintiff. Both Perasich and Gregovich deny that any threats were made, and Perasich denies that there was any padlock on the tunnel door. There is also some conflict as to what occurred at the Tilden mine. Perasich denies that he said he was in possession, and denies that he was in fact in possession at the time this suit was commenced.

But let us assume that the statements of Mr. Koeneker and Mr. Harpham are absolutely correct, and it does not follow that what they did amounts to a resumption of work as the law requires.

Neither states that there was any offer of violence, even at that distance from the mine. No weapon of any kind was shown, and there was no demonstration by any act, so far as the testimony shows, calculated to alarm, beyond these naked threats, made in one instance half a mile, and in the other, seven to twelve miles from the ground in controversy. Moreover, it appears, by the testimony of both, that they went to the mine during their stay at Candelaria, and were altogether unmolested. Why no attempt was made to work at these times does not appear. Words, unaccompanied by any overt act showing a present intention of carrying them into effect, even on the ground, would hardly justify the plaintiff in declining to make some effort to work. But unless the threats were made on the ground, or so near as to amount to the same thing, they certainly ought not to have that effect. The threats made to Mr. Koencke by one of the defendants, half a mile from the mine, do not seem to have had a very serious effect on Mr. Koencke or the other directors, for they still thought in June that the work might be done. Mr. Harpham says he was to try to do the work, and only serve the papers in case he was not allowed to do it; and that he had a considerable sum of money with him — \$100 or so — with which to carry out that purpose. Harpham was not in any way molested when he visited the mine. He made no attempt to work, but sought Perasich at the Tilden mine, seven to twelve miles away, to obtain his permission. I have no doubt that at this time, if Harpham, instead of seeking for Perasich, had made a real effort to perform the labor which the law requires, he would have succeeded. But whether he would or not, it certainly seems to me to have been his duty to try. Yet, although not molested by any one, he is not sure that he got on the claim while he was in Candelaria.

At this time the plaintiff might have resumed work and complied with the law if it were done peaceably. It had no need to ask permission of any one. Either its old claim was good or it had none. It might enter by virtue of its old location so long as the ground remained unappropriated. Whenever there has been such force as excuses from performance, it has been on the ground. I have not been referred by counsel to any authorities on this point. In *Robinson v. Imperial Silver M. Co.*, 5 Nev., 44, De Groot, while engaged in fencing his land under a law which required him to fence within one year, was forcibly stopped by Black and Eastman, and himself and employees driven from the premises. And in *Alford v. Dewin*, 1 Nev., 207-214, the defendants had entered, and the plaintiffs, being wrongfully ousted, could not fence. I will not say that there may not be threats on the ground unaccompanied by acts, of so serious and menacing a character as to satisfy a man of ordinary prudence it would be unsafe to begin work, and in such case it might be an excuse for non-performance. But that is not this case.

Had Harpham, instead of visiting Perasich at the Tilden mine, gone to plaintiff's mine and begun work, at the worst he would have had to leave when ordered off. There is not the least probability that he would have been injured in his person if he had been willing to do this without resistance. I have no doubt, from the testimony, that had Harpham at this time commenced work on the claim resolutely, the defendants would never have interfered with him. At all events, I find that his fears of personal violence had no sufficient foundation and did not justify him in declining to make an effort. It follows that the claim was open to relocation on the 27th day of September, 1880,

when, according to the agreed statement of facts, it was relocated by the defendant, Thomas Perasich.

Another view of this case is this: The complaint alleges an ouster, on the 25th day of November, 1879, by the defendants. Now, it would have been sufficient to have shown such an ouster, and if continued, as alleged, to the time of bringing this suit, it would have been unnecessary to show that work had been performed by the plaintiff so long as the defendants withheld the possession. Because, in November, 1879, there had been no forfeiture. The plaintiff, then, should have stood upon proof of these facts, if they could have been established. But I presume that it had no sufficient proof of them; for it was distinctly admitted, as has been before stated, that unless work was done after January 3, 1879, or such an attempt to work as amounted to the same thing, the claim had been forfeited.

The ouster, admitting one to have been proved, was in June, the proof consisting of an alleged statement by Thomas Perasich, seven miles from the claim, that he was in possession. But the plaintiff sought to establish a possession in defendants, and claims that it did so. It was obliged to show possession in the defendants at the time of bringing this suit, or fail in it.

Upon its own theory, that the defendants were in possession, claiming the ground, I do not see how it can justify an entry upon the possession of another, who, by the terms of the law, has the same right to relocate the claim that the plaintiff or its grantors had to locate it originally. The language of the law is, that after a failure to work, and it is conceded there was a failure in this case, the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," with a proviso that the original locators have not resumed work after failure and before such location.

Did congress contemplate anything besides a peaceable entry and resumption of work, upon an entry by the relocators? I think not. Congress never could have meant to enact a law which would encourage breaches of the peace, as this would if the original locators might resume work at any time before a formal relocation by those who had entered, after forfeiture, for the purpose of relocation. The relocator, after entry for the purpose of locating, would be in the same predicament as the original locator was when he took possession in the first instance, and would have precisely the same rights. The same right to hold the ground against trespassers, upon the basis of his *possessio pedis*, without complying with the local rules and customs, or indeed with the law of congress. *Atherton v. Fowler*, 96 U. S., 513.

So that after a forfeiture incurred, the original locator, it seems to me, cannot put himself in a position to maintain ejectment, except by actually resuming work before an entry by a person seeking to relocate for the forfeiture, and an ouster by such person. For clearly the defendants in this case, finding no one on the ground, had a right to take possession after January 3, 1880. After that date, and before resuming work, there could be no ouster of the plaintiff.

Nor would the plaintiff, after the forfeiture incurred, be justified in making entry on this mining ground while in the possession of another. The threats of Perasich were, therefore, upon the theory of plaintiff that he was in possession, nothing wrong, if this view is right. Let judgment be entered for defendants for costs.

ERHARDT v. BOARO.

(District Court for Colorado: 8 McCrary, 19-26; 8 Federal Reporter, 860-863. 1881.)

Charge by HALLETT, J.

STATEMENT OF FACTS.—The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in controversy. It is incumbent on the plaintiff to show, by preponderance of testimony, that such discovery was made. On this point there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in the locality. The position of the plaintiff is that the lode cropped out at the place, and was clearly disclosed by the slight work with a pick which Carroll testifies to. The position of the defendants is that there was not on the surface of the ground any indications of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy, at and before the time of the location by Boaro.

§ 145. *Discoverer has sixty days to show the vein to be in place.*

I am requested by plaintiff's counsel to add that it is not essential to the validity of a discovery that the mineral-bearing rock should be found in place. If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law allows the discoverer the period of sixty days from the date of his discovery for showing the vein or body of mineral-bearing rock to be in place at a depth of ten feet or more from the surface. That proposition is correct.

The foregoing question, on which the testimony is conflicting, you are to determine, and if, upon that, you find for the plaintiff, you should proceed to the matters hereinafter stated. If, on that point, you find for defendants, your verdict will be for them on that alone, without reference to any other matter.

§ 146. *Rule as to notice at point of discovery.*

2. If you find the first point for plaintiff, a further question for your consideration is as to the posting of notice at the point of discovery. It is incumbent on the plaintiff to show, by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery. Notice in any other form would be as effectual, probably; but as the plaintiff claims that the notice was posted on the claim, it is only necessary to consider whether that method was adopted. Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted, and none found there by Boaro when he made his location. This is a controverted question, similar to the first stated, which you are to determine on the evidence. If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff, that the notice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom.

In this respect the notice was deficient, and under it the locators could not

claim more than the very place in which it was planted. Elsewhere, on the same lode or vein, if it extends beyond the place in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft.

§ 147. *What is necessary to support ejectment for mining claim.*

3. If you find these matters for the plaintiff, a third question for your consideration is whether defendant Boaro, in making the location under which defendants claim, went into the slight excavation made by Carroll and there sunk his own discovery shaft, or run his own cut, making that the basis of defendant's location. If he did so, the plaintiff having then a right to that locality, as before explained, the entry of Boaro was an intrusion into his territory, for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previously taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery shaft so near to that of the first locator as to prevent further work by the latter in the development of the claim. But it is not necessary to advert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery stake, and there made a cut, shaft or other opening on which to found his own location. That is the question in issue between the parties, and you should decide it on the evidence.

§ 148. *Acts necessary to perfect a location. Abandonment as against intruders.*

4. These things being found for the plaintiff, a fourth question for your consideration is whether Carroll, after discovering the lode, abandoned it. To perfect their location it was incumbent on the plaintiff and Carroll, as the locators of the claim, to sink a discovery shaft within sixty days after the date of location, and to do the other things required by statute within ninety days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work, and to perfect the location within the time limited by statute, at the time he set up his stake, if he afterwards abandoned that intention the plaintiff cannot recover. It should appear to you, from the evidence, that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy, and excluding Carroll and the plaintiff therefrom. If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

5. These several questions must be found for plaintiff, by preponderance of testimony, to support a verdict in his favor; for if, after one has discovered a lode and set up a notice of his claim to it, and, within the time fixed by law for doing the work necessary to a valid location, another comes to the same place and takes possession thereof, to the exclusion of the first, he shall not have advantage of his own wrong; nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator. To permit the junior locator to deny the right of the other, under such circumstances, would be to deny him all remedy, which cannot be allowed. And, therefore, if the facts mentioned are established by the evidence, the regularity and validity of plaintiff's location shall be assumed. And if, upon the evidence, you affirm the foregoing propositions for the plaintiff, your verdict should be for him. If you deny any or all of them, you should find for defendants.

§ 149. In general.—If the locators of a mining claim have not at the time of the survey of their claim sunk their shaft to the point where they claim to have found the lode, but afterwards sunk it and then found a lode, they could have advantage of it as against all who had not then acquired an interest in the lode, in the same manner as if they had uncovered it before making their survey and filing their certificate. *Zollars and Highland Chief Con. Min. Co. v. Evans*, 2 McC., 39.

§ 150. On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of one thousand five hundred feet in length and three hundred feet in width, he must prove a lode extending throughout the claim. A party, to maintain an action of ejectment, must prove that he was in possession of his claim when the suit was brought, and that a lode was discovered in the discovery shaft of his claim, and that such lode extended to the ground in dispute. *Ibid.*

§ 151. Right of one in possession.—A prospector on the public mineral domain may protect himself in his possession while he is searching for mineral. His possession so held is good as a possessory title against all the world except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail. Thus the ground in controversy was covered by the surface lines of the Orion claim, located by plaintiffs, and also of the Pendery claim, located by defendants. Both locations were regular as to form, but that of the Orion was first located, surveyed and staked. The locators of the Orion steadily prosecuted work and discovered mineral in place, but the locators of the Pendery also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. *Held*, in such a case, that the judgment must be for the defendants. *Crossman v. Pendery*, * 2 McC., 189.

§ 152. Possession.—A party claiming mining ground not actually possessed and worked—ground beyond the *possessio pedis*—must show his right thereto by constructive possession: and he can show such constructive possession only by physical marks or monuments, or by local laws or rules and his compliance therewith. *Roberts v. Wilson*, * 1 Utah T'y, 292.

§ 153. Under the statute of Colorado, which gives a discoverer of mineral sixty days in which to sink a shaft, etc., the discoverer need not during those sixty days remain in continuous actual possession of the ground. If he puts up a stake at the discovery, giving the name of the lode, date of discovery and notice of his intention to locate the claim, this is equivalent to actual possession. Plaintiffs, while prospecting on the public domain, discovered mineral within about two feet of the surface, and on the 17th day of June set up their discovery stake containing the name of the lode, and other matters required by law. On the 30th of June thereafter, the defendants pulled up the stake, threw it away, entered into possession and went to work in the same hole, and, having sunk a shaft to the required depth, made a location of the claim. Plaintiffs brought their action at law for the possession, and also sought an injunction in aid of their action at law, to restrain the defendants from working the claim and removing ore therefrom. The affidavits filed in support of the motion for injunction show that, in consequence of threats made by defendants, plaintiffs were deterred from entering on the claim and prosecuting the development work within the time required, and that, though they procured a survey to be made upon which to make out a location certificate, this was done secretly, by the officer who made the survey for defendants. *Held*, that the injunction should be awarded. *Erhardt v. Boaro*, * 2 McC., 141.

§ 154. **Local laws, usages and customs.**—The validity of a claim located in Colorado Territory in 1860, no territorial laws having been enacted at that time, is to be determined by the by-laws or rules made by the inhabitants of the district where the claim was situated, or, in case no such by-laws had been made, by the usages and customs of miners in such district, such rules, usages and customs to be proven like any other fact, the courts not taking judicial notice thereof. *Sullivan v. Heuse*,* 2 Colo. T'y, 424.

§ 155. Where parties seek to recover possession of a mining claim by virtue of paper title, there being no evidence that either they or their grantor were ever in actual possession, they must prove that the claim was properly located in accordance with the rules, usages and customs which prevailed in the district at the time the location is alleged to have been made. *Ibid.*

§ 156. **Labor and improvements**, within the meaning of the act of May 10, 1872, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. *Smelting Co. v. Kemp*, 14 Otto, 636.

§ 157. **Notice.**—A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground in a conspicuous position a notice, setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local customs, or, since the statute of 1872, according to the provisions of that act. *Ibid.*

§ 158. **Recording.**—The statutes of Montana (Stats. Ex. Sess. 1873, 83) require a person to make and file in the office of the county recorder a statement of the discovery of "any mining claim upon any vein or lode bearing gold, silver . . . or other valuable deposits." *Held*, that the statute does not apply to and include placer claims; that the discoverer of placer ground is not required to make and file a statement, and that evidence of such filing is inadmissible in support of such claim. *Moxon v. Wilkinson*,* 2 Mont. T'y, 421.

§ 159. To establish a rule or custom of a mining district as to the length of claims located therein, the record of such claims is competent evidence. *Sullivan v. Heuse*,* 2 Colo. T'y, 424.

§ 160. Under the act of assembly of 1874 of Colorado (R. S., 629), requiring a certificate of location of a mining claim to be filed for record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode, where two rival locations overlap each other, and neither has complied with the statute, they may have precedence according to the dates of discovery. *Faxon v. Barnard*,* 2 McC., 44.

§ 161. A certificate of location of a mining claim under the act of congress (R. S., sec. 2324), and the law of Colorado (R. S. Col., 630), must refer to some natural object or permanent monument from which the claim may be identified, and without "such description as shall identify the claim with reasonable certainty" the certificate is void. *Ibid.*

§ 162. The local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession. Whatever may be the effect given to the record of mining claims under section 5 of the act of congress approved May 10, 1872 (17 Stat., 92), it certainly cannot be greater than that which is given to the registration laws of the states, and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title. *Campbell v. Rankin*,* 9 Otto, 261.

§ 163. **Location on dip of vein.**—*Query*: Whether a location made on the dip of a vein would not be valid as against one of later date, higher up. That is to say, whether, if a location be made upon the dip of a vein, the locator may not pursue it in the downward course, although he may not in the upward course, and may not hold the whole which lies within his location and below it, as against any one locating subsequently at a higher point on the same vein. *Iron Silver Mining Co. v. Murphy*,* 3 Fed. R., 388; *Iron Mine v. Loella Mine*,* 2 McC., 121.

§ 164. **Conflicting claims.**—Plaintiff claims the Ontario lode as having been discovered by Geo. A. Gibson and others, on the public land in Colorado, February 11, 1878, and the location completed in July of the same year. Defendants claim the Green Mountain lode as having been discovered by Benj. Barnard, in August, 1877, and the location completed by filing for record a certificate of location in March, 1878. These locations overlap each other to the extent of two and seventeen-hundredths acres, which is the ground in controversy. Defendants' original certificate being defective in not containing a description of location according to

law, they relocated their claim, which relocation was posterior to plaintiff's location. But it appearing that defendants' discovery shaft was in the ground in controversy, and the evidence tending to prove that defendants or their grantors were in possession of the shaft at the time of plaintiff's location, a motion for an injunction was denied. *Faxon v. Barnard*,* 2 McC., 44.

§ 165. To support an adverse claim to a mining claim, evidence that the adverse claimant had dug a ditch and made improvements for the purpose of mining the ground, after filing his adverse claim in the land-office, is not admissible, nor is evidence that he occupied a dwelling-house and blacksmith shop upon the ground. *Moxon v. Wilkinson*,* 2 Mont. T'y, 421.

§ 166. Joint location.—Placer claims may be located by various parties jointly. *Chapman v. Toy Long*,* 4 Saw., 28.

IV. LODES AND VEINS.

SUMMARY—*Right to follow a vein*, § 167.

§ 167. The owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but he may follow the dip to an indefinite distance outside of his side lines. The intent of the act of 1866 (14 St., 251) and of 1872 (17 St., 91) is, as respects end lines and side lines, that mining locations on lodes or veins shall be made lengthwise. It was not the intent to allow a person to make a location crosswise of a vein, and thereby give him the right to follow the strike of the vein outside of his side lines; the side lines become his end lines, considering the direction of the lode. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Though a locator, by sinking shafts to a considerable depth, may strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow it in a regular way. So far as he does not interfere with their right he can work upon it, and no further. And this irrespective of the priority of the locations. *Mining Co. v. Tabet*, §§ 168, 169.

[NOTES.—See §§ 170-182.]

MINING COMPANY v. TARBET.

(8 Otto, 463-470. 1878.)

ERROR to the Supreme Court of the Territory of Utah.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This was an action in the nature of trespass *quare clausum fregit*, brought in the district court of the territory of Utah for the third district by Alexandria Tabet, and continued by his assignee, Helen Tabet, against the Flagstaff Silver Mining Company of Utah (limited), and other persons. The action having been dismissed as to the other persons, judgment was rendered for \$45,000 damages upon the verdict of a jury against the company. The latter carried the case to the supreme court of the territory, where the judgment was affirmed on the 3d day of June, 1878. The company thereupon sued out this writ of error.

The controversy relates to the working of a mine in Little Cottonwood mining district in the county of Salt Lake. The defendant in error claims to own, and to have been in possession of, a mining location on a lode called the Titus lode, the location including three claims, and extending six hundred feet westwardly from the discovery, with a width of two hundred feet, and including ten feet on the east side of the discovery belonging to the South Star mine. The plaintiff in error owned and had a patent for another mining location called the Flagstaff mine, one hundred feet in width and two thousand six hundred feet in length, running in a northerly and southerly direction,

and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously to a point some three hundred feet to the east of their location, and on the north side of the Titus mine, and within about one hundred feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiff in error had a right thus to work outside of its location on the east, and whether in doing so it interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about five hundred and fifty feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein at or near the surface is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiff in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that, by following a level beneath the surface, the strike of the vein runs in a north-westerly direction, or about north fifty degrees west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case the location of the defendant in error would leave the vein to its right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence having been given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows:

"If you find that Alexander Tabet, during the time mentioned in the complaint, to wit, from January 1, 1873, to December 14, 1875 (being a period of two years, eleven months and fourteen days), was in possession of the whole or an undivided interest of Nos. 1, 2 and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface,—then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways,—by the length of the course of the vein within the surface; and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title, or color of title, to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

The court refused to give the following instructions propounded by the plaintiff in error, to wit: "By the act of congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Secondly, "in the very nature of the thing, a lode or vein in its unworked and undeveloped stage cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the act of 1866 was a diagram of the surface area claimed; and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error, which indicates the position which it contends for:

"The plaintiff in error assigns for error the charge of the court and the refusal to give its requests, that is, that the judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the act of congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff Company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

§ 168. *Construction of the act of congress of 1866, relative to mining law. Right to follow a vein.*

Both parties agree in the general rule that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the gen-

eral rule of miners' law, and the true construction of the act of congress. The language of the act of 1866 (14 Stat., 251), in relation to "a vein or lode," is "that no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips, variations and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," etc. The act of 1872 (17 id., 91) is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

§ 169. *Rules for locating mining claims.*

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, 56-58, 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that, having received a patent for two thousand six hundred feet in length and one hundred feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface; it was entitled to two thousand six hundred feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable confusion. Other localities correctly laid upon the lode, and coming up to that of the plaintiff in error on either side,

would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it. Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it and not interfere with their right he might probably do so, but no farther. And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface in order that locations may be properly laid upon it. If it lies entirely beneath the surface and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein, and locations may be properly made on the surface above it so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it. But this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question in a proper manner; and the Flagstaff claims, belonging to the plaintiff in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport.

Judgment affirmed.

§ 170. In general.—A continuous bed of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, constitutes a lode: the thinness or thickness of the matter in particular places does not affect its being a vein or lode, nor does the fact that it is occasionally found, in the general course of this vein or shoot, in pockets deeper down into the earth or higher up, affect its character as a vein or lode. If there is a general and pervading continuance of the mineral matter with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below, it is a vein. The top or apex of a vein is the highest point of that vein, where it approaches

nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. If the highest point is merely a swell in the mineral matter, and it turns over and goes down in another direction, it is not the true apex. The apex does not mean merely the highest point in a continuous succession of rolls or waves in the elevation or depression of the mineral nearly horizontal. When a party's location includes the apex, if in pursuing the vein in a downward direction he escape from the perpendicular extension of the side lines, he may still follow that vein as long as he can find it, and so long as it is the same vein. *Stevens v. Williams*, * 1 McC., 480.

§ 171. As to the right of a party to pursue a vein, the court instructed the jury as follows: "The defendants maintain that the lines — the side lines — of the plaintiff's claim are so located in reference to the shoot or strike of the vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists. You must take all the evidence together, you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes, and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to cover it exactly. His location may be made one way or the other, and it may be so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally as far as his side lines include the apex, so far he can pursue it laterally." *Ibid*.

§ 172. The term lode as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 4 Saw., 802 (§§ 139-41).

§ 173. While metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name lode, true fissure veins found within its limits. It is not every metalliferous zone of country to which boundaries can be found which is to be regarded as one vein or lode. *Mount Diablo Mill, etc., Co. v. Callison*, 5 Saw., 439 (§§ 132-38).

§ 174. Where a location of a mining claim is properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may in its descent into the earth pass beyond those lines and within the end lines of said location. The words used in the statute to designate a mineral deposit in rock in place are *vein*, *lode* and *ledge*, and these are supposed to be nearly synonymous in meaning. A vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The ore body is in place if it is continuous. So far as the ore body is continuous, it must have been deposited in that form or removed bodily, and with its inclosing rocks, to the place in which it may be found. And in either case, as to such continuous ore body, it is proper to say that it is in place. Whether this ore body is of greater or less extent, very thin or very thick, is immaterial, if it extends from the plaintiff's claim into the other. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there can be no lode extending from one claim to the other. *Iron Silver Mining Co. v. Cheeseman*, * 2 McC., 191.

§ 175. Where a mining location is made upon the top and apex of a vein, the law gives the miner the whole vein wherever it may go, and permits him to follow it to any depth, although in its downward course it may enter the land adjoining. *Iron Silver Mining Co. v. Murphy*, * 3 Fed. R., 368; *Iron Mine v. Loella Mine*, * 2 McC., 121.

§ 176. The top or apex of a vein is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. *Ibid*.

§ 177. If, after the lode matter has been deposited, by subsequent upheaval or depression the whole mass was broken into fragments, and a part of the vein or lode was detached from the rest and brought into a new position, it by that circumstance gains a new end or terminal point by which it may be held. It may be separated from the other, originating at a different time, and thus having a different character, although it connects with the other fissure; it may be regarded as a distinct body in itself. If a lode is continuous from one side to the other of a location, that is to say, if coming in at one side it passes unbroken to the other, the miner cannot follow it beyond the lines of his location. The ore may be continuous apparently, with a

difference in origin of the fissure as to the several parts thereof, but if the fissure existed throughout when the ore was deposited — the latter was deposited at one and the same time and by the same forces — it ought to be said that it is continuous. And no location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line. *Ibid.*

§ 178. Mere detached pieces of quartz or mere bunches of quartz not in place do not constitute a vein. *Jupiter Mining Co. v. Bodie Con. M. Co.*, 7 Saw., 96 (§§ 120-32).

§ 179. Although end lines are not in terms named in the rules of the miners, neither under them, nor by virtue of a patent under the act of 1866, can a miner go outside of the end lines of his claim drawn down vertically through the ledge or lode. The patent only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining, that is. land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. Under the act of 1866 the miner could hold only one lode or vein, although more than one appeared in the lines of his location, but the act of 1872 grants him the exclusive right of possession to a quantity of ground not exceeding a certain specified amount, and not only to the particular vein or lode located, but to all other veins, lodes and ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth; but in following these veins, lodes or ledges the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 4 Saw., 302 (§§ 139-41).

§ 180. A location of a mining claim along the line of the top, apex or outcrop of the vein cannot prevail against a senior location on the dip of the lode. *Van Zandt v. Argentine Mining Co.*, * 2 McC., 159.

§ 181. By the statute of Colorado as to the work on the ground necessary to a valid location of a mining claim, it is provided among other things that a discovery shaft shall be sunk to the depth of at least ten feet, or deeper if necessary to find a well defined crevice. And the federal statute declares that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The plaintiff claims the Adelaide mining claim under Walls and Powell; the defendant claims under patent two locations called the Camp Bird and Pine. The ground in controversy is that included in the space of intersection, and a small part of the Adelaide claim north of the intersection. To recover the plaintiff must show that he found a vein or lode in the discovery shaft sunk by him. Ore in a broken and fragmentary condition and not in mass and position is not sufficient; it must be a vein or lode. And this vein or lode must extend throughout the ground in controversy. He must further show compliance with the provisions of the statute as to posting notice, etc. The circumstance that plaintiff's grantors afterwards developed the body of ore in controversy higher up the mountain side does not affect the result. For a location rests on what may be found in the discovery shaft. And if nothing is found there, or if what is found does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail. *Ibid.*

§ 182. Under the act of the Montana legislature of December 26, 1864 (Codified Statutes, 522, sec. 3), which provides that mining claims shall consist of so many feet along the lead and "fifty feet on each side of said lead, lode or ledge for working purposes," held, that the measurement of the fifty feet should begin from the outer walls of the lead, so that the location should consist of fifty feet on each side of the lead or lode in addition to the lode itself. *Foot v. National Mining Co.*, * 2 Mont. T'y, 402.

V. WATER RIGHTS.

SUMMARY — *Prior appropriation*, § 183. — *Possessory rights under act of 1866*, § 184.

§ 183. By the custom among miners, and by the act of congress of July 26, 1866, the right of prior appropriators of waters or streams on lands uses for mining purposes was recognized, and such first appropriator had a better right than others to use the water, but such right was limited as to the quantity and quality of the water by the uses for which the appropriation was made. *Atchison v. Peterson*, §§ 185-188.

§ 184. The ninth section of the act of congress of July 26, 1866, gives the sanction of the United States to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. In other sections it provides for acquiring the title of the United States to claims in

veins or lodes of quartz bearing gold, silver, cinnabar or copper, the possessory right to which had been previously acquired under the customs and rules of miners. The act in no way interferes with possessory rights; it only secures them by a patent from the government. The ninth section only secures rights to water and rights of way over public lands to convey it, and does not grant rights of way where they were not previously recognized by the customary law of miners. The owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation. *Jennison v. Kirk*, §§ 189, 190.

[NOTES.— See §§ 191-195.]

ATCHISON v. PETERSON.

(20 Wallace, 507-516. 1874.)

APPEAL from the Supreme Court of Montana.

STATEMENT OF FACTS.— Atchison and others filed a bill against Peterson and others to restrain them from mining on Ten-mile creek, and diverting and injuring the water, to which they claimed a right as first appropriators. Upon the hearing the bill was dismissed, and upon appeal to the supreme court of the territory the decree was affirmed.

§ 185. *The rights of miners to the use of streams of water on government lands.*

Opinion by MR. JUSTICE FIELD.

By the custom which has obtained among miners in the Pacific states and territories where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 379, "whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without

diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application." 3 Kent's Comm., 439 (side paging).

§ 186. *The rights of miners to streams of water on public land as declared by the courts of California.*

This equality of right among all the proprietors on the same stream would have been incompatible with an extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories by their customs, usages and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories. In *Irwin v. Phillips*, 5 Cal., 140, a case decided by the supreme court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the federal government, and heartily encouraged by the expressed legislative policy of the state, the court said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring

or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers."

§ 187. *Congressional legislation on the right of prior appropriation of water.*

This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its ninth section declares "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. at Large, 253.

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the supreme court of California in *Butte Canal and Ditch Company v. Vaughn*, 11 Cal., 143, where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of *Ortman v. Dixon*, 13 Cal., 33 (see, also, *Lobdell v. Simpson*, 2 Nev., 274), the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken.

What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. (This is substantially the rule laid down in *Hill v. Smith*, 27 Cal., 483; *Yale on Mining Claims and Water Rights*, 194.) But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon

the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

§ 188. *Where there is not clear evidence of irremediable injury, and where defendants are able to respond in damages, a court of equity will leave the complainant to his remedy at law.*

If, now, we apply the principles thus stated to the present case, the question involved will be of easy solution. It appears from the evidence that there is at the point where the defendants work their mining claims only about two hundred inches of water in the creek, according to miners' measurement; that between that point and the point where the Helena ditch taps the creek the distance is about fifteen miles; and that between those points the creek is supplied by several tributary streams of clear water, so that at the point where the water is diverted its volume amounts to about fifteen hundred inches. Of this water the Helena ditch diverts five hundred inches, and conveys it nearly eighteen miles to the localities where it is sold. Running water has a tendency to clear itself, and that result is often produced by a flow of a few miles. But in this case the evidence shows that the water as it enters the Helena ditch is muddied and to some extent is affected by sand. At the same time there is a great preponderance in the evidence to the effect that the deterioration in quality from this circumstance is very slight and does not render the water to any appreciable extent less useful or salable for mining purposes at the localities to which it is conveyed; and that no additional labor is required on the ditch on account of the muddied condition of the water. There is also much doubt left by the evidence whether the sand carried into the ditch does not to a very great extent come from the hillsides lying between it and the mining of the defendants, or lying along the course of the ditch. A sand-gate at the head of the ditch is necessary, whether there is or is not mining on the stream above; and the accumulation of sand from all sources, from the hillsides as well as from the mining of the defendants, only requires the additional labor of one person for a few minutes each day. The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

With respect to the water diverted by the Yaw-Yaw ditch, it is shown that its deterioration, so far as the deterioration exceeds that of the water in the Helena ditch, is caused by sand and sediment brought by a tributary which enters the creek below the head of the Helena ditch.

Decree affirmed.

JENNISON v. KIRK.

(8 Otto, 453-462. 1878.)

ERROR to the Supreme Court of California.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—In 1873 the plaintiff's testator constructed a ditch or canal in Placer county, California, to convey the waters of a cañon and of tributary and intermediate streams to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the cañon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the 1st of November to the 1st of April, the cañon, tributaries and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters, by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or cañon in the mountains known as Fulweiler's Gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and reopened his own ditch, turning into it the waters which had previously flowed in it, and in so doing cut and washed away a portion of the ditch of the testator, as to let out the waters brought down from the cañon above and the intermediate streams. It is for alleged damages thus caused to the testator, and to restrain the continuance of the alleged injury to his ditch and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated because necessary for the repair and reopening of his own ditch and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's Gulch, extending from a point about twelve hundred feet below the crossing of the testator's ditch to a point about twelve hundred feet above it, including the bed of the gulch and fifty feet of its banks on each side; that during this period the ground was continuously held and worked for mining purposes and as a mining claim, in accordance with the usages, customs and laws of miners in force in the district; that in working the claim and extracting the gold the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills and the gold-bearing earth and gravel are washed down and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing

earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment by the defendant of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of congress of July 26, 1866. That section enacted,—

“That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however,* that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.” 14 Stat., 253.

There are some verbal changes in the section as re-enacted in the Revised Statutes, but none affecting its substance and meaning. R. S., sec. 2339.

§ 189. *The act of July 26, 1866, only confirmed to the owners of water rights on public lands the rights they possessed before by mining law, and its proviso only rendered trespassers liable in damages.*

The position of the plaintiff's counsel is, that of the two rights mentioned in this section only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water right, and is not subject in its enjoyment to the local customs, laws and decisions. This position, we think, cannot be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States.

The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The

lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open by law to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts and received their sanction; and properties to the value of many millions rested upon them. For eighteen years,—from 1848 to 1866,—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the state, constituted the law governing property in mines and in water on the public mineral lands. Until 1866 no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free

and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government.

The senator of Nevada, the author of the act, in advocating its passage in the senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the constitution or laws of the state or of the United States, should govern their determination; and a series of wise judicial decisions had moulded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225-3228.

These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the state and moulded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to

protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws and decisions of the courts.

This view of the object and meaning of the ninth section was substantially taken by the supreme court of California in the present case; it was adopted at an early day by the land department of the government, and the subsequent legislation of congress respecting the mineral lands is in harmony with it. Letter of Commissioner Wilson of November 23, 1869; Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872, R. S., tit. 32, ch. 6.

§ 190. *The rights of an owner of a mining claim and of a water right respectively defined and explained.*

By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that, so far as the flow of the water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch by the defendant, this having been done "in the exercise, use and enjoy-

ment of his own water rights, in the usual and in a reasonable manner," as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.

Judgment affirmed.

§ 191. In general.—The act of congress of July 26, 1866, provides "that whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." *Held*, that congress intended to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or by the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superiority, must necessarily control. *Basey v. Gallagher*, 20 Wall., 670.

§ 192. In 1853 a mining company constructed a canal over public land in California, its right to use the same being thereafter exercised and recognized by the customs of miners, the laws and decisions of the courts of the state. A. acquired title to a tract of land, over which the canal passed, by pre-emption, subsequent to the act of July 26, 1866, and to another tract, traversed by the canal, by purchase from a railroad company which had acquired the land under the act of July 2, 1864. A., claiming the canal to be a nuisance, sued for damages. *Held*, 1st, that A.'s pre-emption title was subject to the company's right of way secured by the act of 1866; 2d, that as the government by its policy had always recognized the rights of miners and others to construct canals on the public land, said act merely confirmed to canal owners a right that had always existed, and that therefore, as to the canal in question, the company had a "lawful claim" within the meaning of the act of 1864 which the grant to the railroad company did not affect. *Broder v. Water Co.*, 11 Otto, 274.

§ 193. Under the laws of Montana Territory the same form and solemnity is required to transfer a ditch and water right as to make a conveyance of real estate, although an interest in such property may be acquired by appropriation; but when an attempt is made to convey a water right by a deed, which, for lack of formality, is inoperative, although no valid conveyance is made, such attempt operates as an abandonment of the title acquired by appropriation, and if the grantee in such defective deed takes possession, it is such an appropriation of the water right as will hold good as against the prior appropriator, the grantor, or any subsequent appropriator. *Barkley v. Tieleke*, * 2 Mont. T'y, 59.

§ 194. A., in excavating a tunnel in a mountain to his mining claim, struck a subterranean stream of water, and appropriated the same to his use. Subsequently, B., in tunneling into the same mountain, to a point below where the water had first been discovered, intercepted the stream so that it flowed into his tunnel, whereupon he appropriated it to his own use. *Held*, that A. was entitled to an injunction restraining B. from diverting the stream, even though in order to obey the injunction it would be necessary for B. to construct a dam or bulk-head across his tunnel. *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Saw., 470.

§ 195. Where a ditch and the waters incident thereto have been abandoned, the right to such water having been acquired by appropriation, any party obtaining possession thereof has at least such an equitable interest therein as to enable him to maintain an action against trespassers. *Barkley v. Tieleke*, * 2 Mont. T'y, 59.

VI. TAXING ORE AND CLAIMS.

SUMMARY — *State tax on ore and lien on mine*, § 196.

§ 196. A tax of the state of Nevada levied not on the property right of the United States in a mine, but on the ore dug out of the mine, which is the property of the miner, is a proper tax. And the provision which makes the tax a lien "on the mines or mining claims" only operates to make the tax a lien on the mine when the miner is the owner of the soil. When the ownership of the soil is in the United States, a mining claim is property, and properly subject to the lien of the tax. *Forbes v. Gracey*, §§ 197, 198.

FORBES v. GRACEY.

(4 Otto, 762-767. 1876.)

APPEAL from U. S. Circuit Court, District of Nevada.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This was a suit brought by appellant to enjoin the collector of taxes for Story county, Nevada, from collecting a tax imposed by the law of that state upon the property of the Consolidated Virginia Mining Company, the appellant being a stockholder in the company and an alien subject of the queen of Great Britain. The tax is by the state statutes imposed upon the proceeds of the mine worked by the corporation, and is resisted on the ground that the title to the land from which the mineral is taken is in the United States, and is not for that reason liable to state taxation.

The case is prepared and submitted to us on printed arguments in the very last days of the term, and we are urged to decide it on the ground that it involves a question of vast interest to all the mining operations in the Pacific States, and is of vital importance to the state of Nevada, as it affects her largest source of revenue. In view of its importance we should postpone the decision until next term, if the questions presented were either doubtful or difficult of solution. We think a very few words—all we can give to the subject at this late day—will show that it is neither.

§ 197. *Ore dug from mineral lands belonging to the United States is taxable by a state.*

It is very true that congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, title xxxii, ch. 6, secs. 2318-2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the state of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the state in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the act of February 28, 1871, imposing this tax:

“SEC. 1. All ores, tailings and mineral-bearing material of whatever character shall be assessed for purposes of taxation for state and county purposes in the following manner: From the gross yield, return, or value of all ores, tailings, or mineral-bearing material of whatever character, there shall be deducted the actual cost of extracting said ores as minerals from the mine, the actual cost of saving said tailings, the actual cost of transportation

of said ores, mineral-bearing material, or tailings to the place of reduction or sale, and the actual cost of such reduction or sale, and the remainder shall be deemed the net proceeds, and shall be assessed and taxed as provided for in this act: *Provided*, that in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield, return, or value of said ore, mineral-bearing material, or tailings exceed the percentage of gross yield, value, or return of such ore, mineral, or tailings, as hereinafter specified; on all ores, tailings, or mineral-bearing material, the gross yield or value of which is \$12 per ton or less, the whole amount of deductions shall not exceed ninety per cent. of such gross yield, return, or value; on all ores, tailings, or mineral-bearing material, the gross yield, value, or returns of which is over \$12 and under \$30 per ton, the whole amount of deductions shall not exceed eighty per cent. of such gross yield, value or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is over \$30 and less than \$100 per ton, the whole amount of deductions shall not exceed sixty per cent. of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is \$100 per ton or over, the whole amount of deductions shall not exceed fifty per cent. of such gross yield, return, or value: *Provided*, that an additional exemption of \$15 per ton may be allowed on all ores, tailings, or minerals worked by the Freiburg process.

"SEC. 2. It shall be the duty of the several county assessors within this state to compare and complete quarterly, on or before the second Monday in February, May, August and November, in each year, a tax list or assessment roll of the proceeds of the mines, alphabetically arranged, in a book furnished them by the board of county commissioners for that purpose, in which book shall be listed or assessed the proceeds of all mines in their respective counties, as provided in this act."

"SEC. 6. Every tax levied under the authority or provision of this act on the proceeds of the mines is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold or silver, or either, or any other valuable metal, is extracted for reduction, which lien shall attach on the first days of January, April, July and October of each year, for the quarter year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of the mines, are all paid, or the title to said mines or mining claim is absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining claims."

"SEC. 10. The collection of the tax authorized to be levied under this act shall be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected."

What is this manner of enforcement is to be found in section 110 of a previous statute, which reads as follows:

"At any time while the assessment roll of any quarter is in the hands of the assessor for collection, the assessor may seize upon the personal property, or so much thereof as may be sufficient to satisfy the taxes and costs, of any person, firm, corporation, association or company who shall neglect or refuse to pay such taxes for one week after such demand of the assessor or his deputy, and shall post a notice of such seizure, with a description of the property, and the time and place whereon it will be sold, in three public places in the township or precinct where it is seized, and shall, at the expiration of five days,

proceed to sell at public auction at the time and place mentioned in the notice, to the highest bidder for cash, a sufficient quantity of such property to pay the taxes and costs incurred."

From the first section of the statute we ascertain what it is that is taxed; namely, all the ores, tailing or mineral-bearing material of whatever character, after deducting the actual cost of extracting said ores as mineral from the mines, and other expenses, such as transporting them to the place of reduction, etc.

From this it is clear that it is the ore after it has been separated from the bed in which it is found, and its proceeds and products, which are taxed, and not the ore or mineral in the earth. Indeed, this latter idea is not advanced by any one, and it would be preposterous.

As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is imbedded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim or title of the United States, and is rightfully subject to taxation by the state as any other personal property is.

The truth of this proposition is too obvious to need or admit of illustration or elaboration, and as we have already said, the pressure of business does not admit of it.

In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax or in the sale of the property taxed.

§ 198. — *the tax in such case may be made a lien on the mining claim without affecting the rights of the United States.*

It is, however, urged with more show of reason that section 6, which makes this tax "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," is an interference with the right of property of the government in the lands in which the mineral remains are extracted.

An examination of the language we have quoted will show that it was carefully prepared to avoid this objection, and we think it does.

The use of the words "mines or mining claims" is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of congress, as a mining claim. In the first case, the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject.

In the former case, of course, the United States has no interest to be protected, and the state is at liberty to declare and enforce such a lien for her taxes. In the latter, also, such right as the mining laws allow and as congress concedes to develop and work the mines, is property in the miner, and property of great value. That it is so is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purpose

MINISTERIAL DUTIES AND OFFICERS—MISNOMER.

of evading this tax, permits its investment in this mine, said to be worth from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared to the value of the mine, obtain the government's title to the entire land, soil, mineral and all. Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast states. They are property in the fullest sense of the word, and their ownership, transfer and use are governed by a well-defined code or codes of law, and are recognized by the states and the federal government. This claim may be sold, transferred, mortgaged and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.

We are of opinion that the decree of the circuit court dismissing the bill of appellant on demurrer was right. It is therefore affirmed.

MR. JUSTICE FIELD took no part in the decision.

MINISTERIAL DUTIES AND OFFICERS.

See OFFICERS.

MINISTERS.

See CONSULS AND MINISTERS.

MINNESOTA.

See STATES.

MINNESOTA LAND TITLES.

See LAND.

MINORS.

See DOMESTIC RELATIONS.

MISJOINDER.

See PLEADING AND PRACTICE.

MISNOMER.

See NAME. In Indictment, see CRIME.

MISSION LANDS.

See LANDS.

MISSISSIPPI.

See STATES.

MISSISSIPPI RIVER.

See WATER COURSES.

MISSOURI.

See STATES.

MISSOURI LAND TITLES.

See LAND.

MISTAKE.

[See CONTRACTS; EQUITY; FRAUD.]

SUMMARY—*Proof must be clear*, § 1.—*Mistake of fact*, § 2.—*Policy of insurance*, §§ 3, 7, 8.—*Doctrine of relief in equity*, § 4.—*Mistake of law*, § 5.—*Mutual mistake*, § 6.—*Parol proof*, § 9.—*Arbitration and award*, § 10.—*Sale of gold mine; materiality; negligence; delay in rescinding*, § 11.—*Patent issued to wrong person*, § 12.—*Payment on forged indorsement*, § 18.

§ 1. Before the court can be asked to decree an agreement to exist between the parties different from that which they have put in writing, a mistake in the written instrument must be clearly made out by proofs entirely satisfactory. *Hoover v. Reilly*, §§ 14-16.

§ 2. A mistake of fact going to the essence of the contract avoids it. *Hammond v. Allen*, §§ 17, 18.

§ 3. Equity possesses the power to correct mistakes in policies of insurance, even to the extent of changing the material clauses of the instrument which are the subjects of special agreement. *Dean v. Equitable Fire Insurance Company*, §§ 19-21.

§ 4. A court of equity will grant relief where a refusal so to do would aid the defendant to obtain an unconscionable advantage, through a mistake for which its agents were chiefly responsible, there being no laches on the part of the complainant either in discovering and alleging the mistake or in demanding relief therefrom. *Snell v. Insurance Co.*, §§ 22-25.

§ 5. Where an agreement between two parties was read over and signed by the complainant, there being no concealment or misrepresentation by the defendant, a mistaken belief on the part of the complainant that certain previous agreements were embodied in the writing is a mistake of law and not of fact, and equity will not interfere to reform the instrument. *Hoover v. Reilly*, §§ 14-16.

§ 6. Where a contract is made to pay an agent large commissions to secure a claim upon a foreign nation, which without the knowledge of either of the parties had already been adjusted, such contract being founded on mutual mistake of fact is void or voidable in equity. *Hammond v. Allen*, §§ 17, 18.

§ 7. H. and J., grantees in a fraudulent conveyance, insure the premises in their own name. Prior to the issuing of the policy the grantor is adjudged bankrupt, and D. is appointed trustee.

D. has the insurance company insert in the policy, "payable in case of loss to D., trustee." The policy, if payable to D. through H. and J., is void because of H. and J. having conveyed the property to "D. as trustee," without the consent of the company. *Held*, that there was no mistake of fact sufficient to reform the policy so as to insure D.'s interest as trustee. *Dean v. Equitable Fire Insurance Company*, §§ 19-21.

§ 8. B., an agent of an insurance company, entered into a verbal agreement with A., a member of a firm, whereby he agreed to insure the interest of the firm in certain property. A. assented that the policy should be issued to him upon the representation and agreement of B. that the interest of the firm would be fully protected thereby. The property having been destroyed by fire, and the policy, as issued by the company, only covering A.'s interest by reason of technical terms used, upon bill being filed, equity reformed the instrument so as to cover the entire interest of the firm, although the mistake was in reality one of law. *Snell v. Insurance Co.*, §§ 22-25.

§ 9. To obtain relief against a deed or contract in writing founded in mistake, the mistake may be shown by parol proof. *Ibid*.

§ 10. Where parties enter into agreements, and partition lands upon the basis of an appraisal by arbitrators, and after such partition a mistake of the arbitrators in making the award is discovered, equity will relieve, and if necessary set aside the award. *Yates v. Little*, §§ 26-28.

§ 11. In the purchase of gold-bearing lands it was arranged that H. should show the premises to the agent of the purchaser, and in doing so H. exhibited an abandoned shaft which he supposed to be on the premises, but which belonged on other lands. The misrepresentation as to the shaft was made without the knowledge or authority of the vendor. Specimens of *débris* from shafts on contiguous tracts of land were examined by the vendee, but none from this particular shaft. The sale was concluded and the money paid over without inquiry being made as to where the boundary lines were. A demand for the return of the purchase money was not made until about two months after the mistake was discovered, and after such demand the purchasers carried on imperfect and insufficient explorations for gold, which injured the credit of the property. A bill to set aside the sale was dismissed for the reason that, first, the fact as to which the mistake occurred was not so material as to animate and control the conduct of the party in making the purchase; second, the mistake arose from negligence, the means of knowledge being easily accessible to the purchaser; third, the purchaser did not attempt to rescind as soon as the facts became known to him, but continued to treat the property as his own; fourth, the property having depreciated in value the parties cannot be put in *statu quo*. *Grymes v. Sanders*, §§ 29-32.

§ 12. O. P. of Dodge county, Wisconsin, was directed by his father, O. P. of New York, to locate for him, the father, a tract of government land in Wisconsin. The patent was issued to "O. P. of Dodge county, Wisconsin," and delivered to him, and he took possession, and subsequently mortgaged the land. The father, after notice of the mortgage, permitted him to remain in possession, and, on subsequently selling the land, directed the purchase money to be paid to the son. On foreclosure of the mortgage judgment was rendered against the defendant. In an action by the purchaser from the father against the father for breach of warranty, it was held that parol evidence was not admissible to show that O. P. of New York was the real patentee. *Babcock v. Pettibone*, §§ 33-35.

§ 13. Where defendant collected from plaintiff the amount of a draft, the indorsement of which was a forgery, the forgery not being discovered until ten years after the payment of the draft, and the discovery not being communicated to the defendant until one year after the facts became known to the plaintiff, *held*, to be a case of money paid under a mutual mistake of fact, and that the plaintiff recover the amount paid on the forged draft, the negligence and delay not having occasioned the defendant any damage or loss of remedy against the party from whom he received the draft and to whom he paid the money. *United States v. National Park Bank of New York*, § 36.

[NOTES.—See §§ 87-184.]

HOOVER v. REILLY.

(Circuit Court for Michigan: 2 Abbott, 471-478. 1870.)

STATEMENT OF FACTS.—Bill to reform a written contract. Complainants purchased of defendant an interest in a patent right, paying a part of the purchase money in cash, and giving two notes, one for \$500, and one for \$2,500. In reference to the \$2,500 note it was agreed in writing that it should be null and void if the validity of the claims in the reissued patent

should be declared null and void by the supreme court of the United States. Suit was commenced on this note, and complainant filed the bill in this case, alleging that the real agreement was that the note was not to be paid until a competent court should declare the patent valid; that Reilly was to commence an action immediately to test its validity. It also charges fraud on the part of Reilly in drawing the instrument, ignorance of the law on the part of complainants, and a belief that the instrument as drawn expressed the true agreement, etc.

Opinion by LONGYEAR, J.

The case made by the bill is, not that complainants were mistaken as to the words or language of the written agreement, but that they misapprehended its legal effect. They concede that they read it, and allege in express terms that they believed a certain specified clause to be, in effect, what they allege the real agreement was.

§ 14. *On a bill to reform a written instrument, it is not sufficient that the complainant was mistaken as to the legal effect of its terms; such a mistake is one of law.*

There can be, therefore, and is no pretense that there was any mistake of fact in the case. It was purely a mistake of law. The bill does not allege that the belief so entertained by complainants as to the legal effect of the language used was induced or brought about by any device, statements, representations or expression of opinion of the defendant Reilly. True, it is alleged that Reilly "fraudulently omitted," etc., and that certain provisions were "fraudulently omitted by said Reilly from said paper," etc. But these allegations relate exclusively to Reilly's acts in drawing the paper; and not in any manner to anything he did or said afterwards or at any time to induce in the minds of complainants the erroneous belief which they say they entertained. Neither can it be seriously contended that those are sufficient allegations of fraud upon which to base a prayer for a court of equity to exercise the high powers here invoked. The mere writing of the agreement different from what it was intended to be would be a mistake, an error, but not necessarily a fraud; and yet from aught that appears in the bill this is all there was of it. There is no allegation of any concealment or misrepresentation as to the language used, but, on the contrary, the complainants had it in their possession, perused it, and, without any undue influence, concealment, surprise or imposition whatever, formed a deliberate opinion as to its legal effect, and were satisfied with it.

§ 15. — *such a case might appear plausible if the language used were uncertain or ambiguous in its meaning, or of doubtful construction.*

The complainants then, by their bill, seek to have the written agreement reformed solely on the ground that, knowing what it contained and all its provisions, they signed it under a mistaken belief as to its legal effect. The case might perhaps appear more plausible if the language used were uncertain or ambiguous in its meaning, or of doubtful construction. But such is not the case. It is plain and explicit, and such that any person of even less than ordinary intelligence, although not learned in law, could not fail to comprehend.

Although there are some decisions which would seem to be to the contrary, yet the law is well settled that agreements made and acts done under a mistake of law, stripped of all other circumstances, without any admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that kind of surprise which

equity uniformly regards as a just foundation for relief, are held valid and obligatory. *Adams, Eq.*, 189-191; 1 *Story, Eq.*, §§ 16, 120, 151; *Lyman v. Richmond*, 2 *Johns. Ch.*, 51, 60. The case at bar comes clearly within the law as above stated, and, as made by the bill, is not such as to entitle the complainants to the relief prayed for.

§ 16. *Before a court of equity can be asked to decree an agreement to exist between parties different from that which they have put in writing, a mistake in the written instrument must be clearly made out by proofs entirely satisfactory.*

If, however, we pass beyond this aspect of the case, and look into it as a question of fact, the result must be the same. The case in this aspect, no doubt, comes clearly within a well recognized branch of equity jurisdiction; but before the court can be asked to decree an agreement to exist between parties different from that which they have put in writing, a mistake in the written instrument must be clearly made out by proofs entirely satisfactory. "But," says Mr. Story, "if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief; upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." Mr. Story further says of this rule, "it forbids relief whenever the evidence is loose, equivocal or contradictory, or it is in its texture open to doubt or to opposing presumptions." 1 *Story, Eq.*, §§ 152-157, citing numerous cases, English and American; see, particularly, *Gillespie v. Moon*, 2 *Johns. Ch.*, 585-597; *Lyman v. United Ins. Co.*, *id.*, 630.

Apply this well established rule to the present case, and how does it stand? The mistake alleged in the bill, or any mistake whatever in the written instrument, is expressly denied by the answer. The bill does not expressly call for an answer on oath; neither does it expressly waive an answer on oath; it is entirely silent upon that subject. This was, of course, a defect in the frame of the bill, but the defendants having waived the defect and submitted to answer, their answer must be on oath, the same as though it had been so expressed in the bill, because, by rule 105, an answer on oath is not waived unless it is so expressed in the bill. By well known rules of equity pleading and evidence, the answer being strictly responsive to the bill in regard to the alleged omissions and errors in the written agreement, is evidence for the defendants, and can be overcome only by a clear and undoubted preponderance of proof.

The complainants and the defendant, Reilly, were sworn as witnesses. Upon a full and careful perusal of their testimony, I can see nothing in it to change the aspect of the case as it was left by the pleadings. It is equally contradictory, and of no greater force or effect, than the pleadings.

There were but two other witnesses who testified in the case; Mr. Eminger, on the part of complainants, and Mr. Robinson, on the part of defendants. Each of these witnesses testifies that he was present and heard all that transpired between the parties; and the testimony of each is almost, if not quite, as directly in conflict with that of the other as the testimony of the parties to the suit. The testimony of Robinson is, however, much the more pointed, specific and satisfactory.

Eminger testifies, upon the main point in controversy, as follows: "For the balance, a note was to be given, payable January 1, 1867, providing Mr. Reilly sustained his claims before a competent court. Afterwards, but before the contract was signed, he repeatedly asserted that the Messrs. Hoover should

not pay said note unless his claim was sustained by the court." "After the papers were signed, Mr. Reilly again said that the Messrs. Hoover should have no uneasiness concerning the last note; that he would never ask them to pay a dollar on it unless his claim should be sustained in court." And in a conversation witness had with Reilly after the contract was signed, he said, "You see I don't want anything but what is fair from the Messrs. Hoover, and that unless I make my claims good I shall never ask them to pay a cent on the note." Thus far we are left entirely to inference as to whether an adjudication was to be brought about by a suit to be instituted by one party or the other, and if so, by which party; or, whether it was left contingent upon a suit to be commenced by some other party. But inference is not sufficient ground upon which to do away with or reform a written agreement. As we have seen, the proof must be clear and positive. But this witness gives us a little more light upon the subject. He says, "Mr. Reilly did say that he wanted money to prosecute parties who were infringing upon his patent, meaning Mr. Seiberling, and that he would immediately, as soon as he got matters arranged at home, notify the parties, *and if they did not agree to pay him royalty*, he was to prosecute them in the highest courts, and thereby test the validity of his patent. It was also the understanding that the *contemplated suits* should be or were a part of the contract, and that unless he made his claim valid he would never ask the Messrs. Hoover to pay the last note of \$2,500."

What "contemplated suits" are here referred to? Of course those mentioned just before, that is, suits to be commenced by Reilly, *in the contingency* that parties infringing his patent, on being notified, did not agree to pay him royalty. As to what was to be done in regard to commencing suits in case such parties did agree to pay him a royalty, we are left entirely in the dark. The only inference we can draw from this testimony is, that if parties so infringing did agree to pay royalty, then no suits were to be commenced. And this is really the common sense of the thing after all. Let this be inserted in the contract just as testified to by this witness, in lieu of the provision as it now stands, and it would make no material change in the legal effect of the agreement as a whole.

The testimony of Robinson is much more explicit and satisfactory, and it contradicts Eminger in every important particular; and as he stands before the court on an equal footing with Eminger, as to credibility, his testimony at least neutralizes that of Eminger; and it may be further said that, being in conformity with the written agreement, it is for that reason of greater weight than that of Eminger, which is in opposition to it.

The proofs therefore do not bring the case within the rule of law above stated, under which relief may be granted in such cases, and for that reason, as well as for the reason before stated, that the bill does not state such a case as equity will relieve against, the bill must be dismissed, with costs to the defendants. Let a decree be entered accordingly.

HAMMOND v. ALLEN.

(Circuit Court for Rhode Island: 2 Sumner, 387-400. 1886.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This cause has been elaborately argued; but, after all, the merits lie in a very narrow compass. The brig *Ann* and cargo, owned

by the plaintiff (who was also master), was captured by a Portuguese frigate for a supposed violation of the law of nations in April, 1830; and was finally condemned at Lisbon in April, 1831. The plaintiff after the capture went to Lisbon seeking for a restitution of the brig and cargo, and made representations to the American chargé d'affaires there, and procured his interposition with the Portuguese government in his favor. The defendant Allen, residing at Providence, had been employed by the plaintiff in certain commercial agencies, and had procured insurance on the vessel and cargo for the voyage on which she was captured; and, as soon as he received information of the capture, he made strong applications to the American government in favor of the plaintiff; and acted for him respecting the adjustment of the insurance. His conduct, after it was made known to the plaintiff, was fully approved by him. After the return of the plaintiff to the United States, and on the 22d of December, 1831, the plaintiff executed a letter of attorney to the defendant, whereby he appointed him his attorney, "with power irrevocable," to demand and recover from the government of Portugal, or of the United States, etc., his claim and demand on account of the capture, with other usual and incidental authorities. Subsequent to this time, and on the 27th of January, 1832, after some conversations between the parties, the defendant having certain moneys in his hands belonging to the plaintiff, and having a claim thereon for antecedent services of various sorts, amounting (as he estimated them) to the sum of \$268, and the plaintiff being desirous to realize the whole of the funds, an agreement was entered into between them, which constitutes the subject of the present controversy. The agreement, after reciting that the plaintiff had appointed the defendant his agent for recovering his claims on the Portuguese government, proceeds as follows: "I do hereby agree to pay to the said Allen ten per cent. on all sums which he may recover, until the amount received shall equal the sum of \$8,000; and upon all sums over the amount of \$8,000 so recovered I agree to pay him thirty-three per cent., which commission he is to retain out of any sums recovered." Then follows on the part of Allen the following agreement: "I hereby engage to use my utmost efforts to bring the aforesaid claims to a favorable issue; and that I do agree to receive the aforesaid commission in full compensation for my services and expenses already incurred or hereafter to be incurred in prosecuting the claims." Now, at the time when this agreement was made, though wholly unknown to both parties, the Portuguese government had, by a treaty stipulation dated the 19th day of the same month, allowed and liquidated the plaintiff's claim; so that nothing further remained to be done in the premises. The information of the arrangement was received at Washington in April, 1832. Subsequently one instalment was received and remitted to England, where certain proceedings were had at law and in equity between the plaintiff and the defendant, which terminated in an agreement to remit their respective claims to the domestic forum for a final adjudication.

The object of the bill, under these circumstances, is to set aside the agreement as unconscientious, and without consideration, and to place the parties in the position which they respectively occupied in relation to each other antecedently to that transaction. The parties certainly stood in a delicate relation to each other at the time of this agreement, that of principal and agent; and I need not say, with what scrupulous fidelity, closeness and vigilance a court of equity watches over every transaction between them, in common cases, but especially when there is skill, influence and property on one side,

and distress, ignorance and unmeasured confidence on the other. But considerations of this sort do not require to be more than glanced at on the present occasion, since there is no allegation of fraud, or intentional imposition, or undue advantage set up in the bill.

Some suggestion has been, indeed, made in the bill, and it has been followed out in the argument, that the making of the letter of attorney in its terms irrevocable was not understood or assented to by the plaintiff. The bill asserts the ignorance of the plaintiff; the answer, responding to the bill, as expressly insists upon the plaintiff's knowledge of it. The evidence also is clearly on this point favorable to the defendant. Certainly, as this is on all sides admitted to be a case where there was no intention of the plaintiff to convey an absolute or a mortgage interest in the property claimed to the defendant, the declaration that the power was to be irrevocable must be admitted to be somewhat unusual. But it may have been intended to be a security (in the nature of a lien) to the defendant for his commissions for his services; and then, in a sense, though not in the sense ordinarily given to the terms, it might be construed to be a power coupled with an interest. See *Hunt v. Rousmaniere*, 2 Mason, 244, 342; S. C., 8 Wheat., 174; *Gausson v. Morton*, 10 B. & Cresw., 729. But though irrevocable in its terms, it would certainly have been competent for the plaintiff at any time to have revoked the power, by paying all the just commissions for the services of the defendant connected therewith. At present, however, it is no otherwise important in the case than as it shows the foresight of an intelligent agent, taking an abundant (though not an improper) care of his own interest, and an implicit confidence and devoted trust on the other side.

§ 17. *Where a contract is made to pay an agent large commissions to secure a claim upon a foreign nation, which, without the knowledge of either of the parties, had already been adjusted, such contract being founded on mutual mistake of fact is void or voidable in equity.*

The real question in the case is whether this is such a case of mutual mistake going to the substance of the contract as makes it void, or voidable in a court of equity. Now, the very basis of the contract certainly was that important and valuable services were to be rendered and expenses incurred by the defendant in the future prosecution of the claim. Neither party could have contemplated that the claim was already settled, or that nothing further was to be done to earn so enormous a compensation. The defendant himself surrenders the point. He admits that his antecedent services on this and in all other concerns of the plaintiff could not entitle him to more than \$268; and that if the actual facts had been known to the plaintiff the present agreement would not have been entered into. The basis then, and the whole basis, of the agreement was a mutual mistake of a fact, constituting the whole consideration of the agreement. Each party supposed that the claim was unliquidated, and therefore a high compensation ought to be allowed for future services, which would be rendered at the risk and expense of the agent. His compensation for those services was contingent, and dependent upon the successful issue of the claim; and therefore was liberally, not to say profusely, provided for. The whole argument for the defendant rests on the ground that the possibility of the claim having been already adjusted must have been taken into the account by the parties at the time of the agreement, because it ought to have been taken into the account, and the circumstances naturally led to it. I think that there is not the slightest evidence to establish the fact

that it was actually taken into the account. On the contrary, the whole transaction manifests, on the part of the plaintiff, an utter despondency as to the future success of the claim; and the stipulation on the part of the defendant is for future efforts and future services and future expenses in prosecuting the claim. The *casus fœderie*, if I may so say, the case contemplated by the parties did not exist.

§ 18. *The rule as to mistake of fact.*

There is no principle of law more generally admitted than that a mistake of fact, going to the essence of a contract, avoids it. *Non videntur, qui errant, consentire*, is the maxim of the civil law; and it is a maxim of universal justice. The only question which can arise is in ascertaining and distinguishing what is an error or mistake in circumstances which do not influence the contract, and what is an error or mistake in circumstances which induce the contract. See 1 Fonbl. Eq., b. i., ch. 2, sec. 7, and notes (t) and (v). Pothier has expounded this doctrine with great clearness and precision, and it rests on principles about which it is difficult to frame a doubt. At least, if a doubt can be stated, it has hitherto been wholly unregarded in equity jurisprudence. Pothier on Oblig., p. 1, ch. 1, note 18. Thus (to put a case stated by Pothier) if one, with the intention of buying from you a pair of silver candlesticks, were to buy of you a pair of plated candlesticks, you and he both being in mutual error, supposing them to be silver, such a contract would be utterly void. *Ibid.* So if A. should buy an estate of B., which each supposed to belong to B., and the title of B. should turn out to be utterly void, a court of equity would, upon the ground of mutual innocent mistake, constituting the basis of the contract, rescind it.

It is wholly unnecessary to introduce farther illustrations of so clear a principle, as firmly fixed in English and American jurisprudence as it is in the Roman code; and springing from the same general source, the law of natural justice. Now, I confess myself wholly unable to see how the present case can be extracted from the reach of the principle. It is a case of mutual error upon a matter of fact constituting the very basis of the contract, and the whole consideration for it. The ingenious arguments which have been urged, and the authorities which have been cited, on the present occasion, do not appear to me to establish any solid ground for excepting the present case from the general doctrine. The authorities steer wide of the case. The reasoning, if admissible to its full extent, shakes the very foundation of the general doctrine.

All the cases cited proceed upon a clear distinction. They are cases where the parties at the time contracted upon equal terms, or where all the facts were, at the time, as the parties supposed them to be, but they were varied by subsequent events; or the parties contracted for the very matter of a contingency, that being of the essence of the contract. I agree that mere inadequacy of price is not *per se* a ground to set aside a contract fairly entered into by the parties and having no ingredient of fraud or of a mistake of facts. Mr. Fonblanque, 1 Fonbl. in Eq., b. i., ch. 2, sec. 9, notes (d) and (e), has well stated the general result of the cases, with which there is no reason to be dissatisfied. And if the consideration involves a contingency which may happen before the agreement is carried completely into effect, but has not happened when it is entered into, that furnishes no ground to rescind it; for the parties take the contingency upon themselves *in futuro*. But in all these cases, if there is a mutual mistake of material facts; if there is no longer any existing subject-

matter of the contract; or if the contingency, though unknown to the parties, is actually determined before the parties have entered into the contract, under all these and the like circumstances, the contract fails in its very basis, and in conscience and equity is held inoperative.

The case has been put of a policy of insurance upon a ship or cargo; and it is asked whether a recovery may not be had, even if the ship or cargo is lost at the time of executing the policy? Under our policies it is very certain that a recovery may be had; for our policies all contain the words "lost or not lost;" the effect of which is, that the underwriter takes upon himself the very risk of a loss at the time, receiving a premium for the whole voyage. Perhaps (for I do not know that the point has ever directly arisen in our law) the same result would arise upon the true construction of the general words of the policy, without such a clause, as the underwriter receives a premium for the whole voyage, and undertakes the risks of the whole voyage from its commencement to its end; and, therefore, by necessary implication, if the ship is safe at the commencement he guaranties her safety from that period. Roccus seems to deduce this conclusion from the nature of the contract of insurance, without any clause on the subject. It may be so. 1 Roccus, Assec., n. 51. But then it is upon the clear understanding that it is a part of the risks of the contract taken by the underwriter, for which he receives a proportional premium. Pothier and Emerigon admit this to be the foundation of the special rule applied to this class of cases, and, at the same time, acknowledge the general rule in common contracts to be otherwise. See Pothier, *Traité des Assur.*, n. 11, n. 46; 2 Emerigon, ch. 15, sec. 2, p. 154; 1 Marshall on Insur., b. i., ch. 8, sec. 2, pp. 332, 333. The same principle applies to the case of the safe arrival of the ship, unknown to both parties. In such a case, at least when the policy contains the clause of "lost or not lost" (to which case Mr. Park confines his affirmance of the doctrine. Park on Insur., ch. 19, p. 503 (6th ed.), 1809), the underwriters take all risks upon themselves for the whole voyage; and it is understood that, being so liable, and taking upon themselves all contingencies on account of losses, the assured concedes to them all the benefits of a safe arrival, as an implied result of the contract. But if an insurance were made upon a ship from a particular day, and she had perished before that day, though unknown to both parties, no one would suppose that the underwriter was bound for the loss. 2 Emerigon, ch. 15, sec. 2, p. 156; Roccus, Assec., n. 57. The reason is clear; the insurance was made under a mutual mistake of a fact, constituting the essence of the contract at the time of its inception. So, if an insurance should be made on goods on board a particular ship, and the premium should be paid, if the assured, acting under a mistake, had no goods on board, the premium would be recoverable back; for the policy never attached, and the insurance was made under a mutual mistake of a fact, constituting the basis of the contract. In short, the principle is (as it is stated by Mr. Park), that if the ship or property insured was never brought within the terms of the written contract, so that the insurer never run any risk, the contract is void and the premium must be returned. Park on Insur., ch. 19, p. 503 (6th ed.), 1809.

The case which trenches most closely upon the distinction here stated, but which in fact turned upon the very distinction, is *Earl March v. Pigot*, 5 Burr., 2802. I do not say whether that case was or was not rightly decided, for upon that point grave doubts may be entertained. But the decision there made was upon the ground, that though the actual death of the father of

either of the parties was not then in contemplation of either of them, it was, as an unknown event, wholly immaterial, in the view of both, to the essence of their contract." "If (said Lord Mansfield) it (the fact of such death) had been thought of, it would not have made any difference in the act, and there is no reason to presume that they would have excepted it." That cannot be presumed in the present case, for the very basis of the contract is an existing contingency, and future services and expenses.

In *Mortimer v. Capper*, 1 Bro. Ch., 156, the bargain proceeded upon no mistake of existing facts; and it was sought to be set aside upon events subsequently occurring. The case of the mine, in *Fox v. Mackreth*, 2 Bro. Ch., 420, was not a case of a mutual mistake of a fact vital in the opinion of both parties to the essence of the contract. The sale of the land necessarily included a sale of all below its surface; and, consequently, the vendor must necessarily have contemplated that it included mines as well as common soil. But suppose both parties had contracted under a mutual mistake that there was no mine, as the basis of their contract, would the conclusion have been the same? Certainly not; any more than if they had contracted under a mutual mistake that there was a mine, and there was none.

In the case of *The City of London v. Richmond*, 2 Vern., 421, the only question was, whether a court of equity should refuse to decree a specific performance of a bargain simply because it was a losing bargain, the rent reserved being £700, the real value not more than £300. No fraud or mistake of fact was pretended. In *Ramsbottom v. Parker*, 6 Madd., 6, the question was, whether a contract by one partner, on retiring from the partnership, to pay a particular sum of money, and be discharged from all debts thereof, should be set aside because it turned out by subsequent events that his share of the debts would have been more than ten times as large a sum. The court said that there could be no such relief where the advantage or disadvantage of the contract was to be the result of future contingencies, and was not within the view of the parties at the time. But suppose all the partners at the time had, by mistake, understood that the whole debts were but £5,000; and that this was the basis of their contract; and it turned out that, instead of being £5,000, they were £30,000; it is clear that the contract must have been set aside, as founded in mutual mistake. See on a similar point, 1 Domat, b. i., tit. 1, sec. 4, art. 21.

These are the most important cases on this subject which have been cited by the counsel for the defendant. They all fall short of the point on which the present case hinges, and are distinguishable from it in most material circumstances. In my judgment they leave the case of the plaintiff untouched, upon its original ground of a mutual mistake of facts constituting the very basis of the contract.

But it is said that there has been a full ratification of the contract by the plaintiff, with a full knowledge of all the circumstances. It is wholly unnecessary for me to go into a minute examination of the acts relied upon to establish such a ratification. All I need to say is, that I can perceive no sufficient grounds in any part of the evidence to establish it as a matter of fact. And, in a case of this sort, nothing but a clear and unequivocal ratification, after full deliberation, and a complete review of all the material circumstances, ought to be held satisfactory by a court of equity.

My opinion, therefore, is that the plaintiff is entitled to have a decree that the agreement of the 27th of January, 1832, be delivered up and canceled, and

that a perpetual injunction issue to prohibit the defendant from asserting any title at law, or in equity, under the same. But this decree ought to be upon the terms that the plaintiff bring into court, to be paid over to the defendant, upon his compliance with this decree, the sum of \$268, with interest on the same from the 27th day of January, 1832, which the defendant asserts to be a compensation due to him, and which is not put into contestation on the other side. I think, also, under all the circumstances, there should be no costs to either party. (a)

DEAN v. EQUITABLE FIRE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Clifford, 575-582. 1878.)

§ 19. *Equity in correcting an insurance policy may change material clauses.*

Opinion by CLIFFORD, J.

Courts of equity undoubtedly possess the power to correct mistakes in policies of insurance, even to the extent of changing the material clauses of the instrument which are the subjects of special agreement. But the settled practice is that the power should be exercised with great caution and only in cases where the proof is entirely satisfactory. *Oliver v. Ins. Co.*, 2 Curt., 295. Instruments of this kind may be reformed in equity, where it appears that by fraud or mistake they do not fulfill or that they violate the agreement between the parties; but the party alleging the mistake must show exactly in what the mistake consists and the correction that should be made. *Hearn v. Ins. Co.*, 20 Wall., 490; *Hunt v. Rousmaniere*, 1 Pet., 12.

The jurisdiction of chancery courts in that regard is everywhere admitted; but the question is whether the bill of complaint shows a proper case for equitable interference. Matters well pleaded are admitted by the demurrer, but the corporation respondents deny that the complainant has stated such a case as entitles him to the relief prayed for in the bill of complaint.

STATEMENT OF FACTS.—Sufficient appears to show that the title in the premises insured was in the bankrupt; that he, on the 18th of March, 1876, for some unexplained cause, conveyed the same to John H. Haskell and George S. Jellerson, of New York city, and the complainant alleges that the conveyance was without consideration and in fraud of the bankrupt act.

Though executed in fraud of the bankrupt law, the clear inference from the allegations of the bill is that the deed was in due form; and it appears that the grantees, on the 3d of June, 1876, insured the premises in their own name in the company of the corporation respondents, in the sum of \$2,500, against loss by fire for the term of one year from the date of the policy. Prior to that, to wit, on the 8th of May, in the same year, the grantor in the conveyance was adjudged bankrupt, and on the 31st of the same month the complainant was duly chosen and confirmed as trustee of the estate of the bankrupt, and on the 3d of June following became seized of the bankrupt's estate by due conveyance, as required by law.

Shortly after the appointment of the complainant, information was communicated to him by an agent of the respondents, that he, the agent, held certain policies of insurance on the said premises, payable to Haskell & Jellerson, which he was ready to deliver to the complainant upon payment of the premiums; to which he replied, that if the policies were payable to those par-

ties he would not accept the same; that the property belonged to the estate of the bankrupt, of which he was the trustee, and that the policies must be payable to him as such trustee. Appended to that allegation is the averment of the complainant that he thereby meant and intended that his interest, as such trustee, in the premises should be insured, and that the respondent company had fair and ample notice of such intention that he desired to have his interest in the property insured by good, effectual policies; but he does not allege that he requested that any such policies should be issued to him, or that any other alteration should be made in the policy issued to the grantees of the bankrupt, than what was subsequently made by the company before the policy was delivered to him as such trustee.

They immediately wrote in the policy, or caused to be written, as follows: "Payable in case of loss to Joseph F. Dean, trustee," and forwarded the policy to the complainant; and he alleges that "believing, and having good cause to believe, that said policy insured his interest in said premises, he accepted the same;" that what the complainant wanted was, that in case of loss the insurance should be payable to him, as the trustee of the bankrupt's estate, and that was fully accomplished by the amendment inserted in the policy. Neither party made any mistake in that transaction, and the only mistake subsequently made was that made by the complainant in taking a conveyance from the parties in whose names the policy was issued, without securing the assent of the insurance company. Had he done that, no controversy would ever have arisen.

§ 20. *Although a trustee in bankruptcy hold the equitable title to land, if the formal title be in another, an insurance policy on the property is void though payable to the trustee, if the formal title be afterwards placed in him without notice to the insurers as provided in the policy.*

Plainly it was not a mistake of the company in writing the policy, but of the complainant in allowing the title of the property to be changed without complying with the following condition of the policy: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession, except in case of succession by reason of the death of the assured, whether by legal process, judicial decree, or voluntary transfer or conveyance, . . . then and in every such case the policy shall be void." Conditions of the kind are frequently inserted in policies, and though they often operate with great severity, still they are obligatory in case they are not waived by the company.

It is said that the conveyance was without consideration, but that cannot make any difference, as the formal title was changed before any loss occurred.

§ 21. *Relief in equity in case of mistake.*

Written agreements, whether executory or executed, may be reformed in equity courts where there is a material mistake of fact. In all such cases, says Story, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as a full and correct expression of the intent of the contracting parties, until the contrary is established beyond reasonable controversy. 1 Story, Eq. Jur., § 152; Adams, Eq. (3d Am.

ed.), 171; *Andrews v. Ins. Co.*, 3 Mason, 10 (Ins., §§ 589-98). Apply those rules to this case and it is clear that the complainant is not entitled to any relief. Demurrer sustained and bill of complaint dismissed.

SNELL v. INSURANCE COMPANY.

(8 Otto, 85-98. 1878.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.— Bill to reform a policy of insurance. It appeared from the bill that the firm of Snell, Taylor & Co., composed of Snell, Keith and Taylor, owned two hundred and twenty bales of cotton, at West Point, Mississippi; that Keith, acting for the firm, made a contract to insure the cotton for the benefit of the firm, the insurance being made in the name of Keith, on the assurance by the agents that the interest of the firm would be fully protected. The cotton was destroyed by fire, and the policy was then issued and delivered to Keith.

Opinion by MR. JUSTICE HARLAN.

The elaborate answer of the insurance company comprehends, in the form of express denials and affirmative statements, almost every defense which the ingenuity and skill of able counsel could suggest. But in view of the points to which the evidence seems to have been mainly directed, it is only necessary to consider certain grounds of defense which will sufficiently appear in this opinion.

We are satisfied that a valid contract of insurance was entered into on the 6th of December, 1865, between Keith, representing Snell, Taylor & Co., and Holmes & Bro., representing the defendant and other insurance companies, and we entertain no serious doubt as to its terms or scope. Although there is some conflict in the testimony as to what occurred at the time the contract was concluded, it is shown, to our entire satisfaction, not only that the agreed insurance covered the two hundred and twenty bales of cotton, but that Holmes & Bro., with knowledge or information that the cotton was owned by Snell, Taylor & Co., and not by Keith individually, intended to insure, and, by direct statements, induced him to believe that they were insuring in his name, the interest of the firm. He assented to the insurance being taken in his name because of the distinct representation and agreement that the interest of the firm would be thereby fully protected against loss by fire so long as the cotton remained at West Point. But according to the technical import of the words used in the policy which the company subsequently issued and delivered, only Keith's interest in the cotton is insured. Such is the construction which the company now insists should be put upon the policy if the court decides that there was a binding contract of insurance. The fundamental inquiry, therefore, is whether Snell, Taylor & Co. are entitled to have the policy reformed so as to cover their interest.

§ 22. *Mistake is a head of equity on which a court always relieves.*

We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who

now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities. In *Simpson v. Vaughan*, 2 Atk., 33, Lord Hardwicke said that a mistake was "a head of equity upon which the court always relieves." In *Henkle v. Royal Exchange*, 1 Ves. Sen., 318, the bill sought to reform a written policy after loss had actually happened upon the ground that it did not express the intent of the contracting parties. The same eminent judge said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, would be rectified."

§ 23. *Parol proof will suffice to reform an instrument upon the ground of mistake.*

In *Gillespie v. Moon*, 2 Johns. Ch., 585, Chancellor Kent examined the question both upon principle and authority, and said: "I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense." In the same case he said: "It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show by parol proof a mistake, as well as fraud, in the execution of a deed or other writing." And such is the settled law of this court. *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419; *Insurance Co. v. Wilkinson*, 13 Wall., 222; *Bradford v. Union Bank of Tennessee*, 13 How., 57; *Hearne v. Marine Insurance Co.*, 20 Wall., 488; *Equitable Insurance Co. v. Hearne*, id., 494. It would be a serious defect in the jurisdiction of courts of equity if they were without the power to grant relief against fraud or mutual mistakes in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake. Hence, in *Graves v. Boston Marine Insurance Co.* (*supra*), this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the complainant's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance agents. It was not surrendered to him, nor did he see it, until after the loss had happened. Immediately upon being advised by his attorney that the policy in terms covered only his individual interest, he promptly avowed the mistake and asked that it be corrected in conformity with the original agreement. There was no such acceptance by him of the written policy as would justify the inference that he had either waived any rights existing under the original agreement, or conceded that the instrument correctly set forth the contract.

§ 24. *The rule and the exceptions as to mistakes of law.*

It may be said that the mistake made out was a mistake of law, and therefore not relievable in equity. It was stated in *Hunt v. Rousmaniere*, 1 Pet., 1, as a general rule, that mistake of law is not a ground for reforming a deed, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The court, however, was careful to say that it was not its intention "to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law." In the same case (8 Wheat., 174), Mr. Chief Justice Marshall said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity. In 1 Story, Eq. Jur., sec. 138 *e* and *f* (Redf. ed.), the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American." The same author says: "We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

§ 25. *A court of equity will relieve against a mistake caused by the agents of defendant, and which gives him an unconscionable advantage.*

In the case under consideration the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent that insurance in that form would fully protect the interest of the firm in the cotton. We assume, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the insured. It is however, evident that Keith relied upon that representation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of a written agreement which should correctly express the meaning of the contracting parties. He is not chargeable with negligence, because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel he discovered the mistake and promptly insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances without aiding the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party, either in discovering and alleging the mistake or in demanding relief therefrom, equity will lay hold of any additional circumstances fully established, which will justify its interposition to prevent marked injustice being done. *Wheeler v. Smith*, 9 How., 55 (Est. of Dec., §§ 1174-77).

In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart in any just sense from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts.

We have not overlooked, in this connection, that portion of the evidence which shows that Holmes & Bro., when by letter advising the company of the contract, stated in a postscript that the insurance would be for a few days only. The officers of the company testify that they would not have permitted the contract to stand, and would have promptly canceled the policy, had they not supposed the insurance would last but a few days. It was doubtless the belief of Keith, which he expressed to the insurance agents, that the cotton would not remain at West Point beyond a few days. The evidence shows that he had reasonable ground for such belief. But he seems to have guarded against disappointment in that regard by having it distinctly agreed that the insurance should last until transportation could be obtained and the cotton shipped from West Point. That Holmes & Bro. so understood the agreement is evident from their letter of December 6, 1865, to the secretary of the company, in which they state that they had taken insurance "on two hundred and twenty bales of cotton stored in open shed at West Point, Miss., said cotton to remain insured from above date till time of shipment." It is true that the response of the secretary shows that the company did not approve of such risks. But the contract was not repudiated or canceled, and they only enjoined upon their agents to "decline such business in future." The act of the agents in filling up the blanks in the policy after the loss had occurred was manifestly in consummation of the original contract of insurance.

But independently of the issue in the pleadings as to the mistake in reducing the contract to writing, the company defends the action and denies its liability upon other grounds, which must now be considered.

The answer alleges that at the time of and prior to the alleged verbal contract of insurance the cotton was guarded night and day by soldiers of the United States, who occupied the shed in which it was stored, and who were in the habit of sleeping and eating their meals upon it, and smoking and otherwise using fire upon it, or in its immediate vicinity; that those facts were material to the risk, and would or might have influenced Holmes & Bro. and the company in taking and continuing the insurance, or in regard to the rate of premium; and that such facts, although well known to Keith when he applied for insurance, were not communicated by him to Holmes & Bro. or to the company, but were concealed, whereby the contract of insurance, whether reduced to writing correctly or not, became and was void.

The evidence does not authorize a defense upon such grounds. The proof does not show that Keith, when applying for insurance, withheld any fact known to him and material to the risk. By the terms of the policy he was under an obligation to make a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same were known to him and were material to the risk. The same clause of the policy provides that the risk shall cease, and the policy become null and void, "if any material fact or circumstance shall not have been fairly represented." This language must, of course, be construed in connection with the preceding words of the same clause. We find no evidence in the record showing that Keith did not fairly represent every

material fact known to him. Rawley, who was within hearing of the conversation between Keith and Edgar Holmes (the active manager of the business of Holmes & Bro.), says, that while he cannot recall the language used, he is "positive that Keith explained the character of the risk. . . . I know Keith described the character of the risk fully." When Keith applied to Edgar Holmes for the insurance, the latter asked him how the cotton was stored. He replied, "In an open shed." Holmes then said that he did not like the manner in which it was stored; and Keith replied, it "was guarded day and night." Thus were Holmes & Bro. notified of its condition and situation. The information that it was guarded day and night indicated that there was something in the attendant circumstances which made a guard necessary for its safety. Indeed, if it was to remain, while under insurance, in an open shed, and at a point remote from the company's place of business, it was clearly in the interest of the insurer to have it guarded day and night. But it is said that the habits of the guard were such, at the time of the insurance, as to endanger its safety. If this were clearly proven, the evidence furnishes no ground for imputing to Keith or Snell or Taylor knowledge of any habitual carelessness or misconduct upon the part of the guard which increased the danger of the cotton being burned.

The answer further alleges that on the 8th of December, 1865, whatever cotton there was in the shed at West Point belonging to the complainants was seized by the United States government, or by its officers under its orders and direction, excluding complainants thereafter from all possession and control over the cotton, and that such seizure and exclusion from possession and control were maintained until the cotton was burned; that after such seizure the shed passed to the exclusive possession of soldiers of the United States, who were in the habit of using the same for military defense, of sleeping and eating therein, and of smoking and otherwise using fire upon it and in its immediate vicinity; that at the time of the alleged verbal contract of insurance large quantities of loose cotton were lying under the flooring of the shed, which consisted of loose boards, and immediately under the cotton stored in the shed, whereby the risk of fire was greatly increased; that these facts were, each and all of them, material to the risk, and would or might have influenced the judgment of Holmes & Co., and of the company, in regard to continuing the insurance or to the rate of premium therefor; that Taylor, one of the complainants, knew these facts on the 8th of December, 1865, and in ample time before the fire to have communicated them to the company's agents, and sufficiently long before to have enabled the company to cancel the policy and give complainants timely notice thereof; that by reason of his concealing them from the company and its agents, the policy became and was wholly void.

This defense is doubtless based upon that clause in the policy which declares that "if the situation or circumstances affecting the risk thereupon (the property) shall be so altered or changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure whereby the hazard is increased, and the assured fail to notify the company, or if the title to said property shall be in any way changed, . . . in every such case the risk thereupon shall cease and determine, and the policy be null and void."

It will be observed that an alteration or a change in the occupancy of the premises containing the insured property, unless it increases the hazard, does not avoid the policy, although no notice be given to the insurer. We have

already seen that when the contract was made the company's agents were informed that the cotton was guarded by day and by night. There was no change in the character of the guard, except that prior to December 8, 1865, federal soldiers guarded it as a personal favor to Taylor, while after that date they did so under an order for its seizure. There is some evidence that they were, at times, negligent and careless; but we are not satisfied that their conduct was such as to increase the hazard. In view of the peculiar condition of public sentiment at West Point and in its vicinity against Taylor and others, who had been officially connected with the seizure and collection of cotton, under treasury regulations, the strong presumption is that the presence of federal soldiers largely decreased, rather than increased, the hazard, and was, therefore, for the benefit of all parties interested in the preservation of the property. We attach no weight to its seizure, under orders of federal officials, as in and of itself affecting the rights of the assured. It had been purchased by Taylor for his firm, and with its money, and it does not appear that any of the cotton claimed by him for the firm did, in fact, belong to the United States, or had become forfeited by reason of his violation of the laws, or of the treasury regulations made in pursuance of them. Nor does it appear that he caused or promoted its seizure. So far as the record shows, it was an unauthorized seizure of the private property of the citizen, caused by the personal hostility towards Taylor of a former treasury agent who had himself been suspended from his position through the influence or machinations, as he suspected or believed, of Taylor. If, as alleged, the cotton, upon its seizure, passed from the control of the owner to the exclusive temporary possession of federal officers, such change did not, by the terms of the policy, impose upon the assured the duty of communicating to the company that fact. It was only when the change in the surrounding circumstances increased the hazard that the assured was under an obligation to inform the company thereof. If the seizure had involved a change of title, then the company could have elected to avoid the policy, since it contains express stipulations to that effect. But, as already said, the record furnishes no evidence of any change of title, but only a change of possession and control, made without the assent of the owner, and which he, perhaps, had no power to prevent; and it does not clearly appear that the hazard was thereby increased.

We come now to the only remaining question which it seems necessary to consider, viz., the quantity of cotton in the shed belonging to Snell, Taylor & Co. at the time of the fire. Upon this point a large amount of testimony was taken which is of a very unsatisfactory nature. Witnesses who passed and repassed the shed from time to time, and who had no special reason for making an estimate of the cotton there stored, were asked to give their best judgment as to the quantity.

If the record contained no other evidence than such opinions of witnesses, the court would have great difficulty in reaching a conclusion as to the quantity of the cotton burned. But there is other and better evidence upon which to rest the determination of this question. The officer commanding the federal troops stationed at West Point, and who were in possession of the shed from a date prior to December 6, 1865, up to the time of the fire, states that about the time he took possession, under orders from federal officers, he examined its general condition and counted the bales,—not every bale, but made such a count as satisfied him that there were not less than two hundred and twenty bales, certainly over two hundred bales. He swears that none of

the cotton claimed by Taylor was removed after he took possession of the shed, and he was in such possession up to the time of the fire, except for about two weeks in the latter part of December, during which time Captain Pyle guarded it under the same order. But the most important evidence upon this point comes from the witness Freel. Under the authority of the freight conductor of the Memphis & Charleston Railroad Company, he contracted with Taylor for the transportation of this cotton to Memphis. He made a contract with Taylor for its shipment as soon as the conductor could get to West Point with the necessary cars. In order to ascertain the number of cars needed for the transportation, he counted the bales in the shed, claimed by Taylor, as well as it was possible for him to do. He found that the front tier contained forty-five bales, and that there were five tiers, and his calculation was that transportation was needed for two hundred and twenty-two bales. At the time of this count, which was in the last of December, he made a memorandum for the benefit of the conductor, in a memorandum-book which he produced when giving his testimony. The memorandum was, "222 bales of Taylor's cotton for you to get cars for."

The conductor expected to reach West Point with the cars by the 1st day of January, but he failed to do so. The cars reached West Point on the 7th, the day after the fire, for the purpose of transporting the cotton to Memphis under the contract made by Freel with Taylor. We see no escape, under the evidence, from the conclusion that there were two hundred and twenty-two bales in the shed, belonging to Taylor's firm, at the time of the fire, unless some of it was stolen or fraudulently withheld after Freel's count. Only one witness states any fact from which it may be inferred that any portion of the cotton was stolen prior to the fire, and he only speaks of eight or nine bales being taken off, with the consent of the guard, during a certain night when Taylor was absent from the shed. If that quantity be deducted, as we think it must be, there will be left two hundred and thirteen bales of cotton, averaging, according to the testimony, five hundred pounds per bale, and worth, at the place of its destruction, forty cents per pound.

The decree of the court below will be reversed, with directions to enter a final decree in conformity with this opinion; and it is so ordered.

YATES v. LITTLE.

(Circuit Court for Michigan: 6 McLean, 508-516. 1855.)

Opinion of the Court.

STATEMENT OF FACTS.—This is a bill in chancery, which represents that the complainants owned three equal undivided fourth parts, and the defendant, William L. P. Little, was seized and possessed of one undivided fourth part, of all the real estate in the city of Saginaw, known and commonly called the improved fifty lots. That the complainant Yates was entitled to two-fourths, and the complainant Woodruff to one-fourth; and to make an equitable partition of the lots in value, it was agreed between them that they should be appraised by Eleazer Jewett, Gardner D. Williams and Charles L. Richmond, in regard to the above lots and other property, which embraced the interest of other parties. And on the 14th of September, 1848, the appraisers met at Saginaw city, and after viewing the premises and duly deliberating thereon, did determine on their report in regard to the fifty lots as follows: Lots one and two in block thirty, with the warehouse and wharf, were worth \$7,000;

that lot number three in the same block, with the wharf, was worth \$200; that lot number one in block thirty-five, vacant, was worth \$75; that lot eleven in block thirty-four, with dwelling-house, was worth \$350; that lot seven in block twenty-eight, and Richmond's store, were worth \$500; that lot eight, vacant, was worth \$60; that lot nine, same block, with Cushway's house, was worth \$560; that lot ten, vacant, was worth \$60; that lot six in block eighteen, with the shoe shop on it, was worth \$160; that lots one, two, seven and eight in block twenty-seven, with Webster's house and barn, were worth \$4,000; that lots three, four, five and six, vacant, were worth \$40 each, \$160; that lots nine, ten and eleven were worth \$225; that lot twelve in the same block, with joiner's shop, was worth \$300; that lot seven, block thirty-two, with Little's office, was worth \$190; that lots eight and nine, with Little's house, were worth \$1,380; that lots one, two and three in block one hundred and twenty-one, vacant, were worth \$75; that twelve lots in block one hundred and sixty-six were worth \$530; that south of Cape street, lots one, two, three and four, vacant, in block ten, were worth \$110; that lots five, six, seven and eight, same block, were worth \$160; that lots three and four in block seventeen were worth \$60.

After the partition, it was agreed that the fifty lots, so called, owned by the parties have been partitioned, and it was further agreed that Messrs. Yates and Woodruff shall take, as their portion of the property, block numbered twenty-seven, entire, with all the buildings, improvements and appurtenances; also lots numbered one and two in block numbered thirty, and lots numbered seven and eight in block numbered twenty-eight, with the buildings and improvements thereon.

And W. L. P. Little agreed to quitclaim unto the said Yates and Woodruff all his right and interest above allotted to them as above. And the bill states that the above agreement was consummated, with a slight exception of a modification agreed to, as to the property which was to be released to the complainants, but not as to the appraisal, which remained the basis of the partition. On the 1st of May, 1849, the defendant executed a quitclaim deed for the above 'property to the complainants; and they executed a like deed to the defendant for lot three, on block thirty, north of Cape street, together with other lots.

The complainants allege that the appraisement of lots one and two was made and accepted, under the belief that the warehouse stood wholly on those lots, and that lot numbered three was a vacant lot, with a wharf in front thereof, which was released by the complainant to the defendant at the valuation thereof; and the bill charges that such was the belief of the defendant. But the complaints allege they have since discovered that lots one and two extended only one hundred feet in front on the Saginaw river, and that the warehouse, which is a very commodious one, fronts on the river one hundred and twenty feet, being twenty feet on lot number three.

And the complainants say that until after the agreements were all executed the above discovery was not made; and since it has been made the complainants have tendered to the defendant the full value of the ground occupied by the warehouse on number three. That the warehouse, being divided into stores of thirty feet front, will be irreparably injured by cutting off twenty feet. That lot three was valued and conveyed to the defendant as a vacant lot with a wharf in front. And the complainants pray that relief may be given and the mistake corrected, etc.

To the bill the defendant files a demurrer. And for cause of demurrer states that complainants have made no case for relief; that they have not set out the deeds and writings; that the charges are not made specifically, and that the complainants have not offered to do equity, etc.

The case made in the bill is one of flagrant injustice, though it occurred, not by the contrivance of the defendant, but through the mistake of the appraisers and of the parties. Lots one and two, with warehouse and wharf, were valued at \$7,000. Can any one suppose that one hundred feet, only, of the warehouse was valued? Can any one doubt that the entire warehouse and the ground on which it stood, with the wharf, were included in the valuation? The facts are so clear, looking at the face of the bill, in this respect, that no proof could be more satisfactory. By this mistake the defendant has got more than he was justly entitled to, and the question is whether he can conscientiously retain this advantage. Twenty feet of the warehouse, at the rate at which it was valued, not including the ground, could not be less than ten or eleven hundred dollars. And although the defendant has been applied to, he has refused to correct the mistake. His lot adjoining, with the wharf, was appraised at \$200, and the defendant received it at that price. And he has refused \$350 for the twenty feet of lot, which would be within \$25 of the sum charged him for the entire lot.

This does not present a favorable aspect of the defendant's case; and yet he refuses to do justice, or, in other words, is determined to hold twenty feet of the warehouse which is on his lot. And the question is, can he do so conscientiously. The counsel for the defendant insist that he can, and that the complainants, by reason of their negligence, are not entitled to relief. It is insisted that the relief prayed cannot be given, as the appraisers were appointed by the parties, being judges of their own choosing, and that their decision cannot be set aside. The bill does not specially pray to have the award set aside, but for general relief from the mistake in the partition, by the parties themselves, and the consequent injustice to the complainants.

§ 26. *A court of equity will relieve against a mistake in an award.*

A mistake of the arbitrators is a ground to set aside an award, and no mistake could be more palpable than the one committed in this case. Lots one and two, including the warehouse and wharf, were valued at \$7,000, which, in the partition, were assigned to the plaintiff. Now these lots were not specifically valued, but as connected with the warehouse; and in this view the appraisers estimated the value of twenty feet more ground than the lots one and two contained. And when to this ground is added the twenty feet of the warehouse, both of which the defendant claims, instead of the vacant lot as described and valued, it makes a clear case of injustice, that any court, having the power, would in some mode correct. To refuse this, on the ground that the plaintiffs had been negligent of their rights, under the circumstances would be a mockery of justice. The injustice is so clear that it is matter of surprise how the defendant should consent to take advantage of the mistake. And it is hoped for his own sake that the allegations of the bill are not accurate.

If the conveyance had been executed for the ground in front, occupied by the warehouse, which would have taken twenty feet from lot numbered three, it would have given no more, in all probability, than was in the mind of the appraisers. And yet, under such circumstances, chancery would have corrected the error by making the proper deduction from lot number three.

The parties were misled, and very naturally, by the report of the appraisers. In making partition and executing conveyances they were governed by that report. They failed to do what the plaintiffs and defendant intended to do, and it is most unjust and inequitable for the defendant to claim the advantage in the partition which the mistake has given him. The mistake has chiefly arisen from the parties themselves, and although the mistake of the appraisers led to the thing that was done, the case is not more the error of the arbitrators than the error of the parties. Suppose a party had agreed to purchase a certain tract of land, and through mistake a different tract was conveyed to him, would not this be corrected? Such a mistake often occurs in the conveyance of town lots. No honest man would hesitate to correct such an error, and a refusal to do so would authorize a court of chancery to correct it.

§ 27. *When equity will not relieve in cases of mistake.*

Where an individual has been grossly negligent of his own rights, in some peculiar cases, chancery will not relieve him; as where an individual fails to procure evidence in a trial at law which he might have procured, equity will not relieve him. But the case before us is not one of mere negligence within the meaning of the books. The plaintiffs were non-residents, as appears from the declaration, and this may account for the mistake in the partition unless the contrary be shown.

§ 28. *General equity jurisdiction of mistake. Cases cited.*

Acts done through mistake by principal or agent are not binding. *Horner v. Moore*, 1 McLean, 49. Mistakes and fraud are equally relievable in equity. *Dunlap v. Stetson*, 4 Mason, 249. A mistake of facts, going to the essence of the contract, avoids it: *Hammond v. Allen*, 2 Sumn., 387 (§§ 17, 18, *supra*). A bargain founded upon material misrepresentations of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by mistake of the grantors alone, will be annulled in equity. *Daniell v. Mitchell*, 1 Story, 172. A mistake in the description of lands intended to be mortgaged may be corrected in equity. *Bank of United States v. Piatt*, 5 Ohio, 540; *Hunt v. Freeman*, 1 Ohio, 490.

In Story's Commentary on Equity, 1 vol., sec. 150, it is said: "In like manner, where the fact is equally unknown to both parties, or where each has equal or adequate means of information, or where the fact is doubtful from its own nature, in every such case, if the parties have acted with entire good faith, a court of equity will not interpose; for in such cases the equity is deemed equal between the parties, and when it is so a court of equity is generally passive and rarely exerts a jurisdiction. Thus, where there was a contract by A. to sell to B. for £20 such an allotment as the commissioners under an inclosure act should make for him, and neither party at the time knew what the allotment would be, and were equally in the dark as to the value, the contract was held obligatory, although it turned out upon the allotment to be worth £200." This turned upon the uncertainty of what the value of the allotment would be, and, whether it was more or less, the contract was valid.

In section 151 it is said: "The general ground upon which these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties and disappoints their intentions by mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party."

And again, in section 152, the author says: "One of the most common

classes of cases in which relief is sought in equity on account of a mistake of facts is that of written agreements, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent, by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties." *Durant v. Durant*.

In *Calverley v. Williams*, 1 Ves. Jr., 210, Lord Thurlow said: "No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged, as it is impossible to say one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part, then this pretense to have the whole conveyed is as contrary to good faith upon his side as the refusal to sell would be in the other case. The question is, does it appear to have been the common purpose of both to have conveyed this part."

The argument is, that relief cannot be given, as the court cannot say what the appraisement would have been without the twenty feet. The answer to this is, that the partition was intended to be made on the estimated value of the parcels of property made by the appraisers, so that this objection is not insuperable. Lapse of time and change of value in the property is alleged in the argument, but this does not arise on the demurrer. If it be admitted that no decree can be made against the wife of the defendant, on the final hearing or before it, the court can protect her interests. Upon the above view of the case the demurrer must be overruled.

GRYMES v. SANDERS.

(3 Otto, 55-63. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others. The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitle the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange county, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the ap-

pellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above \$20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft which he supposed was on the premises. There Fisher examined the quartz and other *débris* lying about. But a few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court-house. Arriving too late for the train they drove to the house of the appellant, and Fisher remained there until one o'clock that night. While Fisher was there considerable conversation occurred between him and the appellant in relation to the property; but it does not appear that anything was said material to either party in this controversy. Fisher proceeded to Philadelphia and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for \$25,000. Fisher was sent to the court-house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him.

A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April ensuing the appellees paid over \$12,500 of the purchase money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depository, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first instalment, paid over to the appellant \$10,000, and retained the residue on account of the compensation to which he was entitled under the contract between them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month Lanagan and Repplier came to see the property. Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary lines. Hume said he did not know where they were, and referred them to Johnson. Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises. Hume thought it was. Johnson was positive; and he was right. The appellees seemed sur-

prised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September they sent Bowman as their agent to make the exploration. On his way he stopped at the court-house, and told the appellant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly "that there was no shaft on the land he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation, nor did he know or have reason to believe that any such representation had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do anything more and left the premises. No further exploration was ever made. Johnson says, "I know the land well, and know there has been gold found upon it, and a great deal of gold too,—that is to say, surface-gold,—but it has never been worked for vein-gold. The gold that I refer to was found by the defendant Grymes, and those that worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface-gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood mines. Before the war, a bucket of ore, of from three to four gallons, taken from the latter mine, yielded \$2,400 of gold. This, however, was exceptional. In the spring of 1866 a vein was struck, from forty to fifty feet below the surface, yielding \$500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood mines, and that "the Greenwood veins do pass through the land in controversy, and some of the Melville veins do also." Speaking of Bowman and his last cut, he says:

"At the place I showed him where to cut he struck a vein, but just cut into the top of it; he did not go down through it, or across it. From the appearance of the vein, I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied, that, whenever a proper examination is made, gold, and a great deal of it, will be found in that vein; for it is the same vein which passes through the Greenwood mine, which was struck last spring, and yielded \$500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did anything like making a proper exploration for gold. I don't think he had

more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant that, by reason of the mistake as to the shaft, the appellees demanded the return of the purchase money which had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

§ 29. *What class of mistakes will warrant relief in equity.*

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Kerr on Mistake and Fraud*, 408; *Trigg v. Read*, 5 *Humph.*, 529; *Jennings v. Broughton*, 17 *Beav.*, 541; *Thompson v. Jackson*, 3 *Rand.*, 507; *Harrod v. Cowan*, *Hardin*, 543; *Hill v. Bush*, 19 *Barb. (Ark.)*, 522; *Jouzan v. Toulmin*, 9 *Ala.*, 662.

Does the case in hand come within this category? When Fisher made his examination at the shaft, it had been abandoned. This was *prima facie* proof that it was of no account. It does not appear that he thought of having an analysis made of any of the *débris* about it, nor that the *débris* indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

§ 30. *Mistakes arising from negligence.*

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." *Kerr on Fraud and Mistake*, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Manser v. Davis*, 6 Ves., 678, the complainant being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See, also, *Seton v. Slade*, 7 Ves., 269; 2 Kent's Com., 485; 1 Story's Eq., secs. 146, 147; *Atwood v. Small*, 6 Cl. & Fin., 338; *Jennings v. Broughton*, 17 Beav., 141; *Campbell v. Ingilby*, 1 De G. & J., 405; *Garrett v. Burleson*, 25 Tex., 44; *Warner v. Daniels*, 1 Woodb. & M., 91 (FRAUD, §§ 277-286); *Ferson v. Sanger*, id., 139; *Lamb v. Harris*, 8 Ga., 546; *Trigg v. Read*, 5 Humph., 529; *Haywood v. Cope*, 25 Beav., 143.

§ 31. *What is necessary to rescind a contract on the ground of mistake.*

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas v. Bartow*, 48 N. Y., 200; *Flint v. Wood*, 9 Hare, 622; *Jennings v. Broughton*, 5 De G., M. & G., 139; *Lloyd v. Brewster*, 4 Paige, 537; *Saratoga & S. R. R. Co. v. Rowe*, 24 Wend., 74; *Minturn v. Main*, 3 Seld., 220; 7 Rob. Prac., ch. 25, sec. 2, p. 432; *Campbell v. Fleming*, 1 Ad. & El., 41; *Sugd. Vend.* (14th ed.), 335; *Diman v. Providence, W. & B. R. R. Co.*, 5 R. I., 130.

§ 32. *Where parties cannot be put back in statu quo.*

A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. *Hunt v. Silk*, 5 East, 452; *Minturn v. Main*, 3 Seld., 227; *Okill v. Whittaker*, 2 Phill., 340; *Brisbane v. Davies*, 5 Taunt., 144; *Andrews v. Hancock*, 1 Brod.

& B., 37; *Skyring v. Greenwood*, 4 Barn. & C., 289; *Jennings v. Broughton*, 5 De G., M. & G., 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. *Segur v. Tingley*, 11 Conn., 142; *Haywood v. Cope*, 25 Beav., 140; *Jennings v. Broughton*, 17 id., 232; *Atwood v. Small*, 6 Cl. & Fin., 497; *Marvin v. Bennett*, 8 Paige, 321; *Thomas v. Barton*, 48 N. Y., 198; *Hunter v. Goudy*, 1 Ham., 451; *Halls v. Thompson*, 1 Sm. & M., 481.

The bill, we have shown, cannot be maintained. In our examination of the case, we have assumed that those who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant. Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore, found it necessary to consider the question of such authority; and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative. Decree reversed and case remanded with directions to dismiss the bill.

BABCOCK v. PETTIBONE.

(Circuit Court for New York: 12 Blatchford, 354-359. 1874.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—This action is brought to recover damages for breach of covenant of warranty in a deed executed by the defendant to the plaintiff, April 9, 1866, conveying eighty acres of land in the county of Dodge, state of Wisconsin. Upon receiving the deed, the plaintiff entered into possession, and was thereafter evicted under a writ of assistance issued upon a judgment of foreclosure. The foreclosure was by action, and was upon a mortgage executed by Oliver Pettibone, of Dodge county, Wisconsin, to the La Crosse & Milwaukee Railroad Company, on the 26th of September, 1853. The plaintiff was made a party by this action, and defended upon the ground that the real estate was, in fact, owned by Oliver Pettibone, of the county of Steuben, in the state of New York, instead of Oliver Pettibone, of Dodge county, Wisconsin, at the time the latter executed the mortgage.

It appears by the evidence that, in 1845, the defendant, who then resided in Steuben county, N. Y., and has continued to reside there, attempted to locate a lot of eighty acres of land in Dodge county, Wisconsin, and placed funds in the hands of an agent there to pay the purchase price, but, failing to obtain the particular lot he desired, returned home, and directed his son Oliver, who then resided in Dodge county, to select another lot for him, and apply the money left in the hands of the agent to the payment of the price. The son located the land described in the deed to the plaintiff, applied the money in the hands of the agent as directed, and thereupon the receiver of the land

office issued a certificate acknowledging the receipt of the purchase money from Oliver Pettibone, of Dodge county, Wisconsin Territory. This certificate was forwarded to the general land office, and thereupon, on the 10th of May, 1848, a patent was issued by the United States to "Oliver Pettibone, of Dodge county, Wisconsin Territory," and delivered to the son. The son entered into possession of and improved the land, and, on the 26th of September, 1853, executed the mortgage to the railroad company, under which the plaintiff was evicted. The father learned of the execution of this mortgage about a year after it was executed, reproved the son for having given it, but allowed him to remain in possession until the conveyance to the plaintiff, when the father directed the entire purchase money to be paid by the plaintiff to the son. When the action to foreclose the mortgage was commenced, the present plaintiff, by his attorney, wrote to the defendant, notifying him of the pendency of the action, and requesting information for its defense, and thereupon the defendant informed the plaintiff substantially of the facts as they have been stated. The foreclosure action was litigated, and judgment against the defendant therein rendered in the circuit court for Dodge county, which, on appeal, was affirmed by the supreme court of the state, it being held by the supreme court that extrinsic evidence was not admissible to show that Oliver Pettibone, of Steuben county, N. Y., was the real grantee, it having been proved in that case, as in this, that the son was the only person of his name in Dodge county, Wisconsin.

It is doubtful if the notice given by the plaintiff to the defendant of the pendency of the action in Wisconsin for the foreclosure of the mortgage was of such character as to estop the defendant from contesting the validity of the incumbrance which the judgment in that action established. The notice did not require the defendant to appear and defend the suit, nor was the defense in any manner tendered to him. Strong analogies favor the position that, when the covenantor is notified of the pendency of the suit, and, instead of requiring to be allowed to defend, furnishes information for its defense to the covenantee, he waives a formal tender of the defense, but the authorities do not fully sustain it. I shall consider the judgment, therefore, as but presumptive evidence of the facts which it adjudicated, and the whole question determined by it open here.

The high authority of the court which decided one of the controlling questions here, entitles that decision to great consideration, but, disregarding it as authority in this case, I am satisfied that it was a correct exposition of the law, and that parol evidence is inadmissible to show that Oliver Pettibone, of Steuben county, N. Y., was the person intended as the patentee, instead of Oliver Pettibone, of Dodge county, Wisconsin, who was named as such in the instrument.

§ 33. *The identity of a grantee in a deed is a question of fact, to be established, ordinarily, by evidence de hors.*

It is not to be doubted that the identity of a grantee in a deed is a question of fact, to be established, ordinarily, by evidence *de hors* the instrument, precisely as the identity of the land conveyed is to be ascertained by such evidence. Neither is it doubtful that, if the description of the grantee is equally applicable to two or more persons, a question of latent ambiguity arises, which may be determined by parol, precisely as would be the case if the description of the land conveyed was equally applicable to two or more parcels. It does not follow, however, that, if part of the description is unequivocally applicable

to one grantee or to one parcel of land, and not to the other, extrinsic evidence will be permitted to establish the intent of the grantor, and to control in disregard of the description. On the contrary the general doctrine is clear, that evidence which, passing by and disregarding the description in the written instrument, seeks to import into it and engraft upon it an intention independent of its terms, is not admissible, because it contradicts rather than explains the instrument.

§ 34. *Latent ambiguity defined.*

In my view this case does not present a question of latent ambiguity, in the ordinary acceptation of the term, because a latent ambiguity exists, as tersely stated by Alderson, B., in *Smith v. Jeffreys*, 15 M. & W., 562, "where you show that words apply equally to two different things or subjects-matter," and its solution rests, as stated by Abbott, C. J., in *Beaumont v. Field*, 2 Chitty, 275, not on "what was the meaning of the grantor," but on "what was his meaning by the words used." In this case the words could only apply to Oliver Pettibone, of Dodge county, Wisconsin; and the question is not what was the intention of the grantor when that description was used, but what was meant by the words used. If the words used are clear, unambiguous and determinate, to describe one person or one subject-matter, there can be no latent ambiguity, unless they describe another equally well, and, therefore, there is no room for construction to be sought for in the light of surrounding circumstances.

It is true that, on the maxim *falsa demonstratio non nocet*, an incorrect portion of a description is frequently rejected when sufficient remains in the instrument to indicate with legal certainty the person or subject-matter intended; but this rule is to be followed with caution. It would hardly be contended that if, by will, a testator devised his farm in the county of Dodge, with no other description, his intention to devise his farm in the county of Steuben could be established by extrinsic evidence if it appeared that, at the time of making his will, he had a farm in each county. The test that there must exist sufficient indication of intention on the face of the instrument, after the false description is rejected, to justify the application of the evidence, would not exist in such case, because, when the location of the farm is stricken from the description, there remains nothing in the instrument to indicate which farm was intended to be devised. And in this case, when the description of the patentee's residence is rejected, nothing remains to indicate which Oliver Pettibone was the person intended. To sustain the theory of the defendant it would result that a latent ambiguity must first be created by rejecting a portion of the description, so as to make it applicable to two persons, and then be explained by extrinsic evidence to show which of the two persons was intended, and this when the instrument itself would be destitute of any indication of intent upon its face to justify the application of the evidence. The description here was not applicable to the defendant, and the case is not within the principle which permits extraneous evidence to be given. *Grant v. Grant*, 39 Law Journal Rep., new series, Com. Pleas, 140.

If the conclusion thus expressed is erroneous, there are other difficulties in the way of the defense. The evidence shows that the patent was delivered to the son, and proof that, as between him and the defendant, the son was not entitled to it, or that, as between them, the son was the agent of the defendant to receive delivery, does not establish the fact that the United States was aware of these facts, or recognized the relation of the parties, or intended the

grant to the defendant. The patent was issued and delivered to the son, as the real person entitled to it, under circumstances which justified the United States in treating him as such; and although he was not, in fact, the person entitled to it, as between him and the defendant, the grant to him was not a nullity, but was valid until vacated for mistake, by *scire facias* or by proceedings in equity.

§ 35. *Where one with sufficient knowledge of the facts to put him on inquiry permits another to hold property and create liens thereon, or superior equities in favor of innocent third parties, he must suffer the loss occasioned by his laches.*

With full knowledge of the facts, or of sufficient to put him on inquiry, the defendant lies by from 1854, when he learned that his son had executed a mortgage on the property, without taking proceedings to have the mistake corrected, until the mortgage passed into the hands of a *bona fide* purchaser. If the defendant, instead of the plaintiff, had defended the foreclosure action and alleged mistake and asked to have the patent corrected on that ground, he would have been defeated by his laches and the superior equities of the holder of the mortgage, and the mortgage would have been declared a valid lien. Judgment is therefore ordered for the plaintiff.

UNITED STATES v. NATIONAL PARK BANK.

(District Court for New York: 6 Federal Reporter, 852-855. 1881.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a suit brought to recover the sum of \$100, paid under a mistake of fact. A jury trial has been waived. There is no dispute as to the facts. One Dunlap made application for bounty money, and in settlement of the claim a paymaster of the United States drew a draft on the assistant treasurer at New York for the sum of \$100, payable to the order of Dunlap. The defendant received the draft from another bank for collection, indorsed in the name of Dunlap, and also indorsed by such other bank. Without indorsing the draft, the defendant presented it to the assistant treasurer in New York, and received the \$100, on the 16th of March, 1869, and immediately thereafter allowed it as a credit in its account with the bank from which it was received. The indorsement of Dunlap's name was a forgery.

§ 36. *Money paid under a mutual mistake of fact may be recovered back. When negligence and delay will not defeat the right of action.*

This is a clear case of payment under a mutual mistake of fact. It is claimed, however, for the defendant that the plaintiff cannot recover on account of its negligence in informing the defendant of the forgery after its discovery that the indorsement was forged. It is claimed that the plaintiff discovered the forgery when Dunlap made another application for the bounty, which he did on the 24th of February, 1879, and that no information of the forgery was communicated by the plaintiff to the defendant till February 3, 1880. It is not alleged in the answer, nor is there any proof, that the defendant has suffered any loss or damage by reason of this delay, or lost any remedy over against the party from whom it received the draft and to whom it paid the money. But it is contended that such delay is itself negligence of such a character that loss or damage will be presumed to have resulted from it. I think this point is not sustained, either by authority or the reason of the thing. Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration, and cannot equitably be retained. The rule

is equitable, and may be defeated where to allow the recovery would be inequitable. Negligence in the transaction, unattended with any loss or harm resulting from such negligence to the other party, surely does not impair the equity of the claim against him. Such negligence does not touch the reason of the rule allowing the recovery. If that negligence consists in delay in making the reclamation, with what justice can the party to whom the payment was made say that though he received the money under a mistake of fact, and was bound to return it a year ago, and could not justly or equitably keep it then, because it did not belong to him, yet, now that the party paying has neglected to let him know of his claim after discovery of the mistake, he can justly and properly keep it? This would be absurd.

The authorities are to this effect: that negligence in giving information of the mistake to the other party, with resulting loss of remedy over, is a defense, but otherwise not. The doctrine rests on the duty which the party paying owes to the other to shield him, as far as possible, from loss or damage resulting from the mistake, when he discovers that it is such. If the failure to perform that duty results in loss or damage to the other party, then it is inequitable that he should be obliged to refund. But if that negligence has made no difference to him, then it is immaterial. See *Kingston Bank v. Ellinge*, 40 N. Y., 391; *Meyer v. The Mayor*, 63 N. Y., 455; *Pardee v. Fisk*, 60 N. Y., 271; *Union Bank v. Leath Nat. Bank*, 43 N. Y., 456; *Allen v. Fourth Nat. Bank*, 59 N. Y., 19; *Bank of Commerce v. Mechanics' Banking Ass'n*, 55 N. Y., 213; *Continental Nat. Bank v. Nat. Bank Com.*, 50 N. Y., 575. These cases, it is true, are mostly cases where the negligence imputed was in making the payment or in not discovering the mistake, but I think the reasoning on which they proceed applies with equal force to cases where the imputed negligence is in giving information after discovery of the mistake. *U. S. v. Union Nat. Bank*, D. C., S. D. N. Y., April 24, 1879; 2 *Parsons' Notes and Bills*, 597. The rule declared in *Price v. Neal*, 3 Burr., 1354, which precludes recovery where the mistake consists in the erroneous admission as genuine, by acceptance or payment, of a draft where the signature of the drawer was forged, and the cases following it, are now regarded as exceptions to the general rule that negligence in making the payment, even where the matter mistaken was peculiarly within the plaintiff's knowledge, or one as to which he had a duty of inquiry, unattended with damage, does not defeat the action. *Allen v. Fourth Nat. Bank*, *ut supra*; and see *Welch v. Goodwin*, 123 Mass., 71.

The cases cited by the defendant's counsel, where delay in giving notice that money received was counterfeit was held fatal to the recovery without actual proof of damage, are quite different in principle from this case. They proceed upon the theory that such delay, from the nature of the case, must necessarily impair the remedies over of the party from whom the money was received, and make it more difficult, if not impossible, for him to trace out the source from which he himself received it, or to find the guilty party and obtain restitution from him. *Pindall's Ex'rs v. N. W. Bank*, 7 Leigh (Va.), 617, and cases cited; *Gloucester Bank v. Salem Bank*, 17 Mass., 22. In the present case, the defendant's answer shows that it received the draft from another bank, and its remedy over will be complete upon the plaintiff's recovery in this action. *Merchants' Nat. Bank v. First Nat. Bank of Baltimore*, 3 Fed. R., 66. I think there was no obligation on the part of the plaintiff to surrender or tender to the defendant, upon the trial, this draft. The possession of it was not necessary to a recovery over. I see no force in the argument, urged by

defendant's counsel, that the plaintiff has no just claim, *ex æquo et bono*, because Dunlap cannot sue the government if the plaintiff recovers; nor is there any force in the suggestion that the suit is virtually one for the benefit of Dunlap, and that he has been grossly negligent. What the government may do with the money, or what its duty is towards Dunlap, are matters immaterial. The defendant has received the plaintiff's money, for which it gave no actual consideration, and is bound by law and *ex æquo et bono* to return it. It is unnecessary to consider the point made for the plaintiff that there was no such negligence in this case as the defendant's arguments have assumed, or that, if there was, it would not operate to defeat the action on the general ground that laches is not imputed to the government by reason of the negligence of its officers. Judgment for plaintiff, with interest and costs.

§ 37. **Relief in equity; general principles.**—Where the parties cannot be put *in statu quo*, courts of equity will not grant relief unless imperatively demanded by the clearest and strongest equity. *Kinney v. Consolidated Vir. Mining Co.*, 4 Saw., 382.

§ 38. When an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either in fact or in law, violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. *Hunt v. Rousmaniere*, 1 Pet., 1.

§ 39. Where parties deal with each other in conscious ignorance, a court of equity will not correct a mistake that may have occurred. Thus, where the grantor conveyed "all" his interest "in the mine known as the Kinney (amount unknown)," and the mine actually contained more than the parties at the time of the conveyance supposed, according to their estimates, *held*, that the mistake, if any, was as to how much "all" included, and furnished no ground for relief in equity. *Kinney v. Consolidated Vir. Mining Co.*, 4 Saw., 382.

§ 40. Relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. *Ibid*.

§ 41. When an instrument is drawn and executed to carry into execution an agreement previously entered into, but a mistake existed in the agreement itself, and is clearly proven to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief. *Hunt v. Rousmaniere*, 1 Pet., 1.

§ 42. If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, a court of equity cannot decree another security to be given different from that which had been agreed upon, or treat the case as if such other security had, in fact, been agreed upon and executed. *Ibid*.

§ 43. A written instrument will not be reformed by a court of equity except upon clear and unmistakable evidence that it does not express the intention of both the parties to it. *Graves v. Boston Marine Ins. Co.*, 2 Cr., 419.

§ 44. When, by mistake, an instrument varies from the agreement on which it is founded, it will be considered in equity as if it conformed to the agreement; but if, upon a reasonable construction, it is not plainly at variance with the agreement by reason of the ambiguity of the latter, the instrument will be allowed to stand and the agreement will not be regarded. *Hogan v. Delaware Ins. Co.*, 1 Wash., 419.

§ 45. Equity will not reform an instrument on the ground of mistake, except upon the strongest and clearest evidence to establish the mistake. It is not sufficient that there may be some reason to presume a mistake; the evidence must be clear, unequivocal and decisive. *United States v. Munroe*, 5 Mason, 572.

§ 46. A contract will be reformed by a court of equity upon proof of mistake, and enforced as reformed. *Brugger v. State Investment Ins. Co.*, 5 Saw., 304.

§ 47. A court of equity has power to reform a contract where there has been an omission of a material stipulation by mistake. *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6.

§ 48. Where a bill seeks to correct a mistake, reform the instrument and obtain the consequent relief, the allegations must be most particular, and the bill must conclude with a prayer for a correction of the mistake, and a decree according to the reformed instrument. *United States v. Munroe*, 5 Mason, 572.

§ 49. To reform a written instrument on the ground of mistake, the burden of proof is on the party seeking the relief, and the evidence must be plain and conclusive. *Howland v. Blake*, 7 Otto, 624.

§ 50. In matters of account and cases of mistake, courts of equity have jurisdiction, as those of common law can give no adequate relief, if any. *Ivinson v. Hutton*, 8 Otto, 79.

§ 51. Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either of fact or law, does not fulfill, or violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. *Hearn v. Equitable Safety Ins. Co.*, 4 Cliff., 192.

§ 52. Where terms or stipulations are omitted or inserted in a written agreement contrary to the common intention of the parties, equity will reform the instrument conformable with their real intentions. If the mistake is not mutual, however, but is merely on one side, the instrument cannot be corrected. *Harvey v. United States*,* 18 Ct. Cl., 322.

§ 53. In equity, mistake as well as fraud, in any representation of a fact material to the contract, furnishes a sufficient ground to set it aside and to declare it a nullity. *Daniel v. Mitchell*, 1 Story, 172; 8 Law Rep., 412.

§ 54. Where the leading facts set forth in a bill do not, when analyzed, show a case of fraud or mistake, allegations or averments in the bill that there was fraud or mistake, and the expressions "fraudulently," "deceitfully," "by mistake," etc., interspersed throughout it, will not bring the case within equitable jurisdiction even on a demurrer to the bill. *Magniac v. Thomson*, 2 Wall. Jr., 209.

§ 55. Mistake of law.—In answer to a plea, stating that plaintiff had not complied with the conditions contained in a deed of assignment, it was insisted that the omission to do so proceeded from mistake. *Held*, that for equity to relieve, the mistake should have arisen from some cause distinct from the sense of the instrument, otherwise the mistake, if any, would be one of law and not of fact. *Sims v. Lyle*,* 4 Wash., 320.

§ 56. If a party be in possession of land under title, and, by mistake of law, he supposes himself possessed of a less estate in the land than really belongs to him, the mistake will not in such case prejudice the right of the party, as the law will adjudge him in possession of, and remit him to, his full right and title. *Ricard v. Williams*, 7 Wheat., 59.

§ 57. Ignorance or mistake of law furnishes no excuse in any case, civil or criminal. Thus where an importer, after putting charcoal into No. 12 sugars, entered them at the custom-house as of a lower color, firmly believing that by putting in the charcoal he thereby degraded the sugars within the meaning of the law, *held*, that his misconception of the law did not protect the goods from forfeiture. *United States v. Cargo of Sugar*, 3 Saw., 46.

§ 58. Where a party, instead of taking a mortgage on property, takes an irrevocable power of attorney to sell, under a mistake of law by all parties that the latter is as safe as the former, whereas a power of attorney ceases with the death of the donor, a court of equity will not relieve by substituting for such power of attorney a lien or mortgage on the property. *Hunt v. Rousmainere*, 2 Mason, 342; 3 Mason, 294.

§ 59. Where a power of attorney, which as such ceased at the death of the donor, is alleged to have been intended by the parties to it as a lien upon the property in regard to which the power was given, and bill is brought to enforce the agreement for security, and it is admitted by demurrer to the bill that the power of attorney was given and received under the belief that it was, and with the intention that it should create, a specific lien and security, *held*, that a court of equity is capable of giving relief, although the mistake is one of law. *Hunt v. Rousmanier*, 8 Wheat., 174.

§ 60. Mistake or ignorance of the law affords no ground of relief from contracts fairly entered into with a full knowledge of the facts. A bill of exchange, payable at New Orleans, was drawn, indorsed, and accepted in Kentucky. At maturity it was protested for non-payment and returned. The debtors applied to take it up, when the creditors claimed ten per cent. damages by force of the statute of Kentucky. All the parties were perfectly aware of the facts and earnestly believed that the damages were due by force of the statute, and, influenced by this opinion of the law, a note was executed for the amount due, including \$1,000 claimed for damages. As a matter of fact, the bill of exchange was not subject to the payment of damages by force of the statute. *Held*, in accordance with the above principle, that as the note was given under a mistake of law, no relief could be granted. *Bank of the United States v. Daniel*, 12 Pet., 32.

§ 61. Where a party has failed to obtain, through mistake, that to which he was entitled by an existing valid contract, even though the mistake be one of law, equity will relieve. There is a wide distinction between a case where an instrument is what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but, by mistake, fails to do so. *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt., 277.

§ 62. A corporation required a license of persons keeping a livery-stable, and liverymen, be-

lieving that the corporation had the power to exact such licenses, took out and paid for the same. Afterwards it was decided that the corporation had no power to require the licenses. *Held*, that the money paid for such licenses was paid under a mistake of law and could not be recovered. *Corporation of Washington v. Barber*, 5 Cr. C. C., 157.

§ 63. Where a contract contained the following: "In further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of \$1,000," and one of the parties subsequently claimed that he understood such sum to be "liquidated damages" and not a "penalty," *held*, to be a mistake of law, and, as such, not relievable in equity, no fraud being charged. *Robinson v. Cathcart*, 3 Cr. C. C., 377; 2 Cr. C. C., 590.

§ 64. Where, in a contract for the sale of land, the parties bound themselves "each to the other in the penal sum of \$1,000," such sum being a reduction, at the suggestion of the vendee, of the sum first proposed by the vendor, the vendee believing that, by the terms of the agreement, he would be at liberty to rescind the contract by paying the penalty, and the vendor, with full knowledge of the interpretation placed upon the contract, by his silence allowed the vendee to sign the instrument under this mistaken idea as to its import, *held*, on the filing of bill for specific performance, that, although the mistake was one of law, it was one to which the vendor contributed, which fraudulent conduct would justify a court of equity in refusing specific performance. *Cathcart v. Robinson*, 5 Pet., 264.

§ 65. It is no excuse for a brewer that he violated the revenue laws under a mistake as to the construction of the law, or a misconception of his rights thereunder. *United States v. Foster*, 2 Biss., 453.

§ 66. Money paid with knowledge of the facts and under a mistake of law cannot be recovered back. A., holding lands under a contract of sale from B., contracted to sell the same to C., taking from the latter an agreement to pay all taxes and assessments imposed upon the lands. C. having failed to pay the taxes, the lands were put up at tax sale and bid in by the county. Whereupon D., trustee of A., paid into the county treasury a sum sufficient to redeem the lands. Afterwards, the taxes for which the lands were sold having been determined illegal, D. returned the tax certificates and demanded the money paid by him to the county, which being refused, he brought suit to recover the same. *Held*, that as there was no fraud, duress or mistake of fact, but only mistake of law, the money could not be recovered. *Lamborn v. County Commissioners*, 7 Otto, 181.

§ 67. A misrepresentation or mistake of the law does not vitiate a contract either at law or in equity. Where a party subscribed for \$10,000 worth of stock in a corporation upon the representations of the agent of the corporation that by the laws of Illinois and the charter of the company he might become a subscriber, and by means of a certificate to be given him, marked "non-assessable," he would really be liable only to the extent of one-fifth of his subscription, and that good lawyers had given their advice to that effect, such exemption having been decided to be void, *held*, that the mistake was one of law and that his liability could not be avoided on that ground. *Upton v. Tribilcock*, 1 Otto, 45.

§ 68. Where one, having arrested his debtor defendant on a *ca. sa.*, sets him at liberty on certain terms, at his instance, it being expressly acknowledged by the defendant that this is done "for his accommodation, without any prejudice whatever to arise to the plaintiff's right by the enlargement, or otherwise howsoever," and the agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counselor of the law, a court of equity will not interpose to enjoin the defendant from pleading this discharge as payment, upon allegations, in a bill demurred to, that there was either a mistake common to both parties as to the effect of the agreement, or else that the plaintiff, not knowing its effect, while the defendant did know it, it would be a fraud in the defendant to profit by the plaintiff's misconception, or ignorance of what he was doing, and set up at law the payment by his liberation on the *ca. sa.* *Magniac v. Thomson*, 2 Wall. Jr., 209.

§ 69. Where a release is given to one joint debtor, although under a misapprehension of its operating to discharge the co-debtor, a court of equity will not relieve from it in the absence of fraud or unfair practices. *Joy v. Wurtz*, 2 Wash., 266.

§ 70. Waiving the question whether the allegation of a mistake of law would give jurisdiction to a court of equity, the court will not listen to the allegation, where the mistake, if any, was made by a member of the bar, who is the attorney of the party seeking to take advantage of the alleged mistake. *Magniac v. Thomson*, 2 Wall. Jr., 209.

§ 71. *State boundaries.*—Where commissioners appointed to determine the boundary between two colonies, intending to mark a line in a certain place, mark it by mistake four miles further south, encroaching so much upon the territory of one of the colonies, equity has power to grant relief. *Rhode Island v. Massachusetts*, 15 Pet., 233.

§ 72. Where, upon a controversy arising as to the boundary line between Massachusetts and Rhode Island, the line was established in 1711 by a joint commission, and re-established in 1718, the decision of the commissioners being adopted by the respective colonies, *held*, that after the

lapse of more than one hundred years, the line of compromise would not be disturbed on account of mistake made by the commissioners, such alleged mistake being based upon the interpretation of the charter of Massachusetts, the terms of which were equivocal and capable of different constructions. *Rhode Island v. Massachusetts*, 4 How., 591.

§ 73. *Patents for land.*—A defendant in equity who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants; but the complainants will not be required to convey to the defendant land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey. *Bodley v. Taylor*, 5 Cr., 191.

§ 74. *Advertisement of sale.*—Where in the advertisement of sale of trust property the day of the month was correctly stated, but a wrong day of the week was given, and a notice published the day before the sale took place corrected the mistake, equity will not set aside the sale on account of irregularity, in the absence of any intent to mislead, when no one is in fact misled. *Chandler v. Cook*, * 2 MacArth., 176.

§ 75. *Agreement in court.*—Where parties enter into an agreement in a court, whether of common law, chancery or prize, if made under a clear mistake, the agreement will be set aside. Thus, where several parties owned different portions of a cargo which was condemned, and it was agreed in court that, in relation to their claims, the fate of all the causes should depend upon that of A.'s claim, *held*, that if a real substantial difference existed between the case of A. and that of the other claimants, and the agreement was made by mistake without knowledge of that difference, the parties to such agreement would be relieved. *The Hiram*, 1 Wheat., 440.

§ 76. *An insurance policy may be reformed and canceled for mistake even after a loss has occurred.* Thus, where a policy was by mistake made for fourteen months instead of two months, and the fire occurred about one year after the policy was issued, on bill to reform the policy relief was granted. *North American Ins. Co. v. Whipple*, * 2 Biss., 418.

§ 77. Upon application by a mortgagee to have his interest in the mortgage insured, A., acting indirectly as the agent of the underwriters, under a mistake as to the law governing the case, made the application in the name of the mortgagor, payable in case of loss to the mortgagee, and the policy when issued contained the name of the mortgagor as the assured. Upon bill brought by the mortgagee to reform the policy and for general relief, *held*, that there was mutual mistake, brought about by the misrepresentations of the agent as to the law governing the case, which warranted the correction of the policy. *Sias v. Roger Williams Ins. Co.*, 8 Fed. R., 188.

§ 78. To set aside a contract on the ground of mutual mistake, it is not necessary to go into a court of equity. Thus, where a party, unaware that his property was already insured, entered into a contract of insurance by the terms of which the policy was to be void if there was other insurance on the property not disclosed, and upon learning of the prior insurance the company issuing the second policy marked their policy canceled, *held*, that the mutual mistake avoided the policy *ab initio*, and that upon suit on the prior policy, which contained a clause making it void if subsequent insurance should be taken upon the property thereby insured, it was no error for the judge to charge the jury that if they found that the second policy was issued under a mutual misapprehension as to the existence of a prior policy, there was no second contract of insurance in violation of the condition of the policy in suit. *Wilson v. Queen Ins. Co.*, 5 Fed. R., 674.

§ 79. Where the owner of a vessel employs A., an agent, to obtain a policy of insurance thereon, and such agent acts through B., an insurance broker who makes the contract with the insurance company, but, in declaring the interest, by mistake gives the name of A., which is inserted in the policy instead of that of the real owner, equity will correct the policy by having the real owner's name inserted instead of A.'s. *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt., 277.

§ 80. The accidental failure of an agent to declare his principal's interest in a contract of insurance which he has just negotiated is a mistake in the execution of a power, which a court of equity will more willingly correct than a mistake in a written contract. *Ibid.*

§ 81. Complainants, applying for a policy of insurance on a ship, stated that the ship was "chartered to go from Liverpool to Cuba, and load for Europe, *via* Falmouth for orders where to discharge." The underwriters replied, "As requested, we have entered \$5,000 on the charter of barque Maria Henry, Liverpool to port in Cuba, and thence to port of advice and discharge in Europe." The policy corresponded exactly with this reply. The insured understood the contract of insurance to allow the vessel to go to a second port for a return cargo. *Held*, that evidence of usage that all vessels similarly chartered should visit two ports in Cuba was not competent to show that the underwriters must also have so understood it; that the court might, on the ground of mistake, reform the policy to correspond with the intention of the parties. *Hearn v. New England Mutual Marine Ins. Co.*, 4 Cliff., 200.

§ 82. Equity will not relieve against the effect of a mistake made in a policy of insurance by the assured, describing the property as being in one building, whereas in fact it was in another. *Severance v. Continental Ins. Co.*, 5 Biss., 156.

§ 83. Courts of equity unquestionably possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses therein which are the subjects of special agreement; but the settled practice is that the power should be exercised with great caution, and only in cases where the proof is entirely satisfactory. *Hearn v. Equitable Safety Ins. Co.*, 4 Cliff., 192.

§ 84. Where it was the intention of the parties to insure a mill and machinery, but through an error of the agent of the insurance company only the "mill-building" was insured, although the proposed valuation was more than double that of the mere house, *held*, that the assured was entitled to have the contract corrected and then enforced as corrected. *Brugger v. State Investment & Ins. Co.*, * 7 Rep., 616; 8 Ins. L. J., 298.

§ 85. A ship and cargo insured for and during her voyage to the West Indies. The memorandum for insurance contained this clause: "The Union is bound to Kingston, Jamaica; if not allowed to sell there will proceed to Cuba." At Kingston, the port not being open, the brig was seized and condemned for the illicit trade. *Held*, that the memorandum could only be considered as a representation of the present intention of owners, to guard against any objection for concealment or misrepresentation, and that the policy could not be reformed on the ground of mistake, so as to make it, by embracing the memorandum, cover the contingency of the voyage to Jamaica being lawful, except upon the clearest evidence of the intention of the underwriters to insert the clause. *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6.

§ 86. Surveys.—Where the mistakes of a surveyor are shown by satisfactory proof, courts of law, as well as courts of equity, look beyond the patent to correct them. If a mistake is apparent upon the face of a survey, and natural or artificial marks, or the reputation of the neighborhood, have fixed the boundaries of the land different from those delineated in the survey, a subsequent location is so far affected by the real boundaries that a court of equity will not permit a title derived under such location to be set up against the owner of the land intended to have been located by the first survey. *Conn v. Penn*, Pet. C. C., 496.

§ 87. Award.—Where an award is made settling the respective claims of two parties, and the arbitrator and one of the parties are dead, the case must be brought clearly within the limits in which courts of equity are accustomed to interfere to justify the granting of relief. *Bispham v. Price*, 15 How., 162.

§ 88. In the settlement of complicated partnership accounts by means of an arbitrator, B. was charged with one-half of certain custom-house bonds, which A., the other partner, was liable to pay, and which obligations had been incurred on partnership account. There was a reservation in the settlement as to certain liabilities, but this one was not included. A.'s estate was afterward exonerated from the payment of these bonds by a decision of the court. *Held*, that, as the arbitrator's award included many items which were the subjects of estimates, and was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of A., if an error of judgment occurred by which the chance was overrated that the custom-house bonds would be enforced against A., it was not such a mistake as to constitute a ground for the interference of a court of equity. *Ibid*.

§ 89. Where plaintiff filed a bill for relief from a judgment entered on the award of referees, claiming to have certain credits allowed to him, which had not been given to him in the accounts stated and adjusted between him and the defendant, upon the award given, *held*, that plain mistakes in facts, which appear upon the face of the award, or which could be made out from the evidence laid before the referees, or for their examination, might have been taken advantage of by exceptions to the award, and for that reason cannot afterwards be made the subject of a claim to relief in equity. *Hurst v. Hurst*, 2 Wash., 127.

§ 90. In an action by the indorsee against the acceptor of a bill of exchange, drawn for the amount of an award, the acceptor cannot avail himself of a mistake of the arbitrators in making up the award. *Miller v. Butler*, 1 Cr. C. C., 470.

§ 91. Judicial sale.—Three tracts of land were sold, under a decree of a court of chancery, by commissioners appointed for the purpose. The commissioners exhibited the title papers at the sale, expressing a certain quantity, and sold the land, as directed by the decree, by the acre, undertaking, however, neither for quantity nor title, and declaring that the purchaser must buy at his own risk. A judgment was obtained against the purchasers on their bonds, but upon bill filed, and proof that the intestate whose lands were sold was not entitled to nor ever in possession of a single acre under one of the deeds, and that the other two tracts were deficient, *held*, that as there was mistake on the part of the court granting the decree of sale, the judgment for the purchase money would be enjoined to the extent of the deficiency in the land. *Quære*, if the land sold so far below its value as to justify the court in the opinion that the purchaser took

into his estimate the deficiency in the quantity, should not the bill be dismissed, unless the purchasers would consent to vacate the contract? *Strodes v. Patton*, 1 Marsh., 228.

§ 92. Deed of trust.—Where two deeds of trust of the same land are given, but the first deed by mistake describes different lands, and suit is brought twenty years after the giving of the first deed, equity will not correct the mistake and reform the instrument against the innocent trustee in the second deed, who is considered a purchaser for a valuable consideration. *New Orleans, etc., Co. v. Montgomery*,* 5 Otto, 16.

§ 93. Where a deed of trust is executed to secure a debt, and the name of another person is inserted by mistake instead of that of the *cestui que trust*, a court of equity will rectify the error, if the facts are clearly established, and order the payment of the money to the *cestui que trust* in the first instance. *McCall v. Harrison*,* 1 Marsh., 126.

§ 94. Where by mutual mistake the word "west" is used instead of "east" in describing property in a deed of trust, on bill filed by the grantees, equity will correct the mistake not only against the grantor, but also against the grantee in a prior deed of trust upon the same premises, the existence of which was unknown to the grantees, and which was not recorded until a year after the recording of their conveyance; and when so corrected it becomes a first incumbrance. *Fenwick v. Bruff*,* 1 MacArth., 107.

§ 95. Payment by mistake.—Where plaintiff sent to the bank of N. an amount of money, to be placed to the credit of the bank of M., as the amount due from him to the latter, but by mistake sent more than the requisite sum, the bank at M. becoming insolvent before the mistake was discovered, and an assignment being made, and the assignee in insolvency having received the sum deposited with the bank of N. to the credit of the bank of M., the plaintiff is entitled to recover from such assignee the extra amount sent by mistake. *First National Bank of Omaha v. Mastin Bank*,* 2 McC., 438.

§ 96. Money paid to a collector voluntarily, under a mistake of law, cannot be recovered back from him after he has innocently, and without notice of any objection, paid it over to the United States. *Elliott v. Swartwout*, 10 Pet., 137.

§ 97. The general rule is that money paid to an agent, as such, under a mutual mistake of fact, cannot be recovered from the agent after it has been paid by him to his principal. *United States v. Pinover*, 3 Fed. R., 305.

§ 98. But where, upon the redemption of a stolen bond, which contained a forged indorsement, an agent received the money thereon from an assistant treasurer of the United States, and paid the same over to his principal, *held*, that he was personally liable, as the assistant treasurer had no authority or power to bind the government by the payment, or to consent that the money so paid should be delivered over to the principal by the agent. *Ibid*.

§ 99. Where money is paid under a mistake it may be recovered if prompt notice of the discovery of the mistake is given to the party to whom it is paid; but if such party loses his remedy over against another party through the negligence of the person paying the money in not giving notice of such mistake, it cannot be recovered. *United States v. Union National Bank*, 10 Ben., 408.

§ 100. Where the United States paid money under a mistake of fact, and the assistant treasurer gave notice of the discovery of such mistake and demanded the money back, but afterwards withdrew both the notice and demand, *held*, that if the officer had authority to give the notice he was the proper officer to withdraw it, and the party receiving the money having lost his remedy over, by having relied on such withdrawal, his liability was discharged. *Ibid*.

§ 101. The purchaser of a vessel, who has paid the expenses and disbursements of a previous voyage upon the order of the master, cannot recover them from the master, although he paid them under a mistaken expectation that he was to be reimbursed out of the freight. *Hodgson v. Butts*, 1 Cr. C. C., 488.

§ 102. Money paid on an erroneous judgment which is afterwards reversed is money paid by mistake and may be recovered. *Bank of Washington v. Bank of United States*, 4 Cr. C. C., 86.

§ 103. A railroad, incumbered by two mortgages of different dates, being sold on execution, was purchased by certain holders of bonds secured by the junior mortgage, who organized themselves into a new corporation, under the laws of the state where the road was situated, and conducted the business of the road as their own. The mortgagees under the senior mortgage having obtained a decree of foreclosure, the new corporation paid the debt and had the mortgage canceled. Subsequently, on bill by judgment creditors, the sale to the junior mortgage creditors was set aside as in fraud of other creditors. *Held*, that equity could not decree a recovery of the money paid by the purchasers to cancel the senior mortgage, as paid over under a mistake of fact, or subrogate such purchasers to the senior mortgagee's decree of foreclosure. *Railroad Co. v. Soutter*, 13 Wall., 517.

§ 104. Negligence.—Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must

have exercised at least the degree of diligence which may be fairly expected from a reasonable person. *Kinney v. Consolidated Vir. Mining Co.*, 4 Saw., 832.

§ 105. A sale will not be rescinded on the ground of mistake as to the amount of timber on the land, where there was ample opportunity to examine the land and no fraud was committed. *Mason v. Crosby*, 1 Woodb. & M., 342.

§ 106. A mistake as to the value of shares of stock given in exchange for land is not a sufficient ground for setting aside the conveyance where the vendor had ample means and opportunity for avoiding the mistake by inquiry, and no fraud or falsehood was used to influence his judgment. *Warner v. Daniels*, 1 Woodb. & M., 90; *Mason v. Crosby*, id., 342.

§ 107. Where a farm is sold as containing a certain number of acres, at so much per acre, and there is a mistake as to the quantity, equity will relieve the party injured by allowing him, if there is a deficiency, to take the property, such as it is, with an abatement of price for the deficiency. *Stebbins v. Eddy*, 4 Mason, 414.

§ 108. Where a contract for the sale of a tract of land embraced in a patent, supposed to contain one thousand five hundred and thirty-three acres, but which in reality contained eight hundred and seventy-six acres more, was so worded as to embrace this surplus, *held*, in a suit to enforce specific performance of the contract, that as the surplus of land in the patent beyond that which it called for, nominally, was so great, it could hardly be presumed to have been within the view of either of the parties to the contract of sale, and hence the plaintiff not having made the payments called for by the contract, the court, in the exercise of its discretion, with an eye to the substantial justice of the case, would decree a conveyance of the surplus, requiring the vendee, however, to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same. *King v. Hamilton*, 4 Pet., 311.

§ 109. Six years after the purchase of timber land, the vendee claimed relief in equity on the ground of mistake as to the amount of timber on the land, etc. In the meantime the land had been mortgaged by him and the mortgage had been foreclosed by the mortgagee. *Held*, 1st, that it was a strong circumstance disproving a material mistake as to the premises, that the purchaser occupied them nearly six years without complaint, and, without any fraud to conceal mistakes, it was evidence of negligence in seeking relief which should bar it; 2d, as full opportunities were enjoyed of examining the premises, and they were examined, and no falsehood or fraud appeared in any material representations, or act in relation to them, no relief could be had on the ground of mistake; 3d, it would not be equitable to rescind the contract after the purchaser had taken timber from the land, and mortgaged it to a third person who had foreclosed the mortgage, as a release by the purchaser would be useless, and the propriety of awarding damages as well as the power to do so was doubtful. *Ferson v. Sanger*, 1 Woodb. & M., 188.

§ 110. A bargain founded upon material misrepresentations of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by the mistake of the grantors alone, will be annulled in equity. A contract was made by certain parties, wherein it was agreed that one party should sell, and the other buy, a certain tract of timber land, and if, upon an exploration, it did not contain sixty millions of pine timber, and there was not a stream running through it, etc., the agreement should be void. The parties procured an exploration, and upon a favorable report of their agent purchased the tract, taking a deed of the same, and making the stipulated payments. It subsequently appeared that there was a gross mistake in the estimation of the quantity of timber; that the exploration was not made entirely upon the tract in question, but partly upon an adjacent one, and that the pine timber did not in fact exceed five millions. Upon bill filed to rescind the contract and for general relief, *held*, that the original contract must be set aside as founded in gross mistake; that the conveyance to the plaintiff must be rescinded and the purchase money restored. *Daniel v. Mitchell*, 1 Story, 173; 3 Law Rep., 412.

§ 111. *Compromise by an heir.*—Where an heir, under pressure of pecuniary necessity and an undue confidence in the representations of the executors, who represented that the will under which he took nothing was valid, whereas the same was invalid and void, entered into a compromise with the executors, *held*, that such compromise was invalid. *Wheeler v. Smith*, 9 How., 55.

§ 112. Where new securities, taken as substitutes for old ones, are rendered invalid by reason of failure of consideration, fraud or mistake, equity will annul the cancellation and revive the old securities. *Burnhisel v. Firman*, 22 Wall., 170.

§ 113. *Settlement—Receipt.*—If the claim of a person giving a receipt in full on a settled account be honestly contested and a compromise agreed upon, both parties are bound by it; but a receipt being mere *prima facie* evidence of what it purports, if proof be made that it was unfairly obtained, or that it was given under a mistake of facts, or of the legal rights of the party who gives it, it is open for examination of any errors which may be pointed out and

proved. But it is not sufficient to show that, for the same services as those stated in it, other persons have received a greater compensation, or even that such was to be paid in the particular case, for the settled account and receipt is a later contract. It is necessary to show in addition to this that the complainant acted in ignorance and mistake of his rights. *Lawrence v. Schuylkill Navigation Co.*, * 4 Wash., 562.

§ 114. *Deeds.*— If in conveying a part of a mining claim the grantor makes a mistake to his own detriment as to the amount conveyed, and in the same conveyance makes another mistake, in his own favor, of a like amount as to another part of the mine, so that the grantee obtains, upon the whole, no more nor no less than was bargained and paid for, the equities being thus equal, equity will not, at the instance of the grantor, correct the mistake against him, if, taking the transaction as a whole, such correction would result to the injury of the other party. *Kinney v. Consolidated Vir. Mining Co.*, 4 Saw., 382.

§ 115. A party who seeks to have a mistake corrected in equity must first do equity. Thus, where the complainant gave a deed of mining land without a stamp, whereas the law required deeds to be stamped, and his grantees conveyed the land to defendants by stamped deed, and the complainant alleged that the deed from his grantees to the defendants, by which the defect in his conveyance to the former was cured, was executed by mistake, *held*, that equity could not correct the mistake for the purpose of allowing him to avail himself of his own wrong in failing to stamp the deed, and thus destroy the effect of a sale which he had made, and for which he had received his consideration. *Ibid.*

§ 116. A written agreement was entered into between A. and B., by which it was agreed that land belonging to A. should be conveyed to B. "subject to" an incumbrance. Whereupon A. delivered to B. a deed of the land "subject to" the incumbrance. The deed also contained a clause, inserted by A., who was well aware of the legal difference between the two forms of expression, stating that B. assumed and agreed to pay the incumbrance. Prior to the above agreement, A., through his agent, had attempted to get B. to assume the payment of the incumbrance, but B. had refused. At the time of the delivery of the deed, B. was ill, and did not read the clause relating to the assumption of the debt; but upon discovering it afterwards promptly brought suit to have the deed corrected. *Held*, that the deed must be reformed as departing, through mutual mistake, from the terms of the actual agreement, and that, under the circumstances, B. was not guilty of such negligence in not examining the deed at the time of its delivery as to prevent him from obtaining relief. *Elliott v. Sackett*, * 2 Sup. Ct. Rep., 375.

§ 117. A., the original grantee of land in Kentucky, under a survey and warrant from Lord Dunmore, granted the land to B. by metes and bounds based upon first information. The return of the surveyor, however, which, under the laws of Virginia, is the only legal identification of land, was of another boundary. Thus the land described in the deed to B. was never owned by A. The land returned by the surveyor was confiscated and sold by the state as belonging to A. under the warrant. *Held*, that as the deed to B. did not specify the date of the warrant, the number of acres, nor the person to whom it was issued, the evidence of intention was insufficient to warrant a reformation of the deed to B., thus compelling the grantees of the state to reconvey, especially as forty years had elapsed since the conveyance to B. *Russell v. Trustees of Transylvania University*, 1 Wheat., 432.

§ 118. Where a deed conveys a certain number of acres "more or less," such qualifying words are intended to cover a reasonable excess or deficit; and if the difference between the real and the represented quantity be very great, a court of equity will correct the mistake. Thus, where the grant was of "two thousand six hundred acres, be the same more or less," an excess of one thousand acres was held to be sufficient evidence of mistake to entitle the grantor to compensation for such excess. *Thomas v. Perry*, Pet. C. C., 49.

§ 119. *Mortgages.*— Equity cannot reform a mortgage for uncertainty or misdescription unless the evidence is sufficient to identify the land intended to be conveyed. Thus, where description in mortgage was "one hundred acres of land upon the O. river opposite D. island, being part of the same lands conveyed to me by B.'s heirs," and these lands consisted of several parcels, all of which were covered by liens, a bill to reform was dismissed. *Turner v. Hart*, * 1 Fed. R., 295.

§ 120. Where in executing a mortgage the name of the mortgagee is omitted by mistake, equity will reform the instrument by inserting the mortgagee's name. *Parlin v. Stone*, 1 McC., 443.

§ 121. Where the grantee accepts of a mortgagor a deed in which a clause is inserted without his knowledge, making him personally liable to pay the incumbrances upon the premises, he cannot set up the mistake to avoid his liability on the notes, secured by the mortgage, in the hands of a *bona fide* purchaser before maturity, who took the notes subsequent to the conveyance from the mortgagor to the grantee. *Hayden v. Drury*, 3 Fed. R., 782.

§ 122. Where a mortgage conveyance contains an erroneous description of the premises, a

court of equity will correct the instrument so as to make it conform to the intention of the parties, where the rights of intervening *bona fide* purchasers will not be prejudiced thereby. *Reeves v. Vinacke*, 1 McC., 213.

§ 123. Delay.— Unless a party, desiring relief in equity, acts promptly after the mistake is discovered, he will be deemed to have waived all objection to the contract on account of such mistake, especially where the subject of the contract is property of a speculative character, such as mining claims, subject to constant fluctuations in value. *Kinney v. Consolidated Vir. Mining Co.*, 4 Saw., 382.

§ 124. Miscellaneous.— Where property seized in admiralty is delivered over to the claimant upon his furnishing bond with sureties, the fact that the adverse party was ignorant that the property was owned by several partners is no ground, in the absence of fraud or mistake, for relief in equity against parties other than those against whom judgment has been rendered, although the latter prove to be insolvent. *United States v. Ames*, 9 Otto, 35.

§ 125. In suit for goods sold and delivered plaintiff claimed \$1.37½ per dozen for handles delivered between certain dates. The defendant objected that there were items of those dates carried out in the bill of particulars at \$1.25 per dozen. The plaintiff claiming that the bill of particulars contained a mistake in that respect, the court charged the jury that while the plaintiff could not recover for any more handles than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have. *Held*, no error. *Ames v. Quimby*, 16 Otto, 342.

§ 126. A. imported a quantity of merchandise in his own vessel, consigned to B., who received the goods, and gave bonds for the duties to the United States, with C. and D. as sureties. The invoice and bill of lading showed the goods to be the property of A., but the bond was executed by B., without calling himself the agent of A., as the law required in case he was such agent. *Held*, that the sureties could not recover of A. the amount of the bonds paid by them, on the theory that it was by mistake that the agency of B. did not appear; that the bond was properly given by the consignee of the goods, and therefore there was no mistake; and if there were a mistake, it could not be rectified at law, and in equity the plaintiffs would be told that equality is equity, and that a court of equity will not rectify a mistake in order to violate one of its favorite maxims. *Childs v. Shoemaker*, 1 Wash., 494.

§ 127. Where a bottomry bond is given upon vessel and freight only, but in a recital in the bond it is stated that the master was necessitated to take the sum loaned on the "vessel, cargo and freight," if the word "cargo" is omitted from the hypothecating part of the bond by mistake, and this fact is stated in the libel, it seems the bond may be reformed. *The Schooner Zephyr*, 3 Mason, 341.

§ 128. A. purchased from a settler ninety-nine one-hundredths of a tract of land of one hundred acres, belonging to the state. The remaining acre was granted by the settler to B. Afterwards the state commissioners, in pursuance of legislative enactment to the effect that each *bona fide* settler, or his assignees, should receive one hundred acres upon the payment of a small consideration, granted to A., as assignee of the settler, the whole tract, including the one acre already assigned to B. *Held*, that B. was entitled in equity to have the one acre conveyed to him by reason of the mistake of the commissioners in considering A. as assignee of the whole tract. *Dunlap v. Stetson*, 4 Mason, 349.

§ 129. A license given by W. to C. to use patented machines in a certain county, and sell therein plank and lumber dressed by such machines, provided that C. should not use more than six machines there, "nor use any such machines, nor sell and dispose of any plank or other thing dressed and prepared in such machines, anywhere else within the United States." It concluded as follows: "It is understood that C. has all the rights I (W.) have in said county, under said patent, to use six machines, and no more." Where it appeared that the actual understanding between W. and C., at the time, was that C. was not to be restricted as to place in selling the dressed plank, and that the last clause was inserted for that purpose, *held*, that equity would reform the instrument by the insertion of a clause to the effect claimed; and that the matter entitling the licensee to such reformation was a good defense to a proceeding to enforce a specific performance of the contract, where the clause omitted through mistake would, if found in the instrument, constitute a good defense. *Woodworth v. Cook*, 2 Blatch., 151.

§ 130. Where one partner, having committed frauds on the firm, makes an assignment of all the partnership effects to indemnify the injured partner for "all errors and misentries in keeping the books of the firm," the evident intention of the parties being to indemnify the defrauded partner for all injuries sustained in the partnership business, the court will, on the ground of mistake, reform the agreement and assignment so as to indemnify for goods taken by the defrauding partner himself, or money received from customers and not accounted for, if such reformation be necessary to furnish such indemnity. *Askew v. Odenheimer, Bald.*, 380.

§ 181. Where an administrator, not having previously given the proper bond with sureties, approved by the judge of probate, sold certain real estate, it was held that the sale was void, the bond not having been given; that whether the omission was accidental or not, it could not be treated as a mistake or accident remediable in a court of equity. *Bright v. Boyd*, 1 Story, 478.

§ 182. Certain parties executed a contract for the sale of potatoes to the government, in "such quantities (not exceeding three thousand bushels per week) as may be required," under the belief that they were entering into a contract for the sale of nine thousand bushels of potatoes to be delivered as required. The contract, which was held by the claimants two weeks before it was executed, accorded with the terms of the advertisement instead of the claimants' bid. *Held*, that the claimants' long possession of the contract before its execution precluded them from imputing fraud or mistake. *Clark v. United States*,* 1 Ct. Cl., 248.

§ 138. A., owner of a promissory note made by B., placed the same in the hands of a broker, who sold it to C., after 11 o'clock in the forenoon, C. paying the money to the brokers. On the same day, at half-past 10 o'clock, an attachment was issued against B., and all his property seized, and his place of business closed. Four days thereafter his notes went to protest. The brokers having paid the money into court, *held*, that C. was entitled to the money thus deposited, on the ground of mutual mistake as to the solvency of B. and the value of his paper. *Harris v. Hanover National Bank*,* 15 Rep., 390.

§ 184. A. purchased land, B. signing his notes for the purchase price as surety, the grantor giving bond to convey upon payment of the price. Upon default by A. judgment was recovered against B. as surety. Whereupon the grantor delivered up the first bond and executed a new bond to convey to B. Prior to the execution of this second bond, and unbeknown to the grantor, A. had allowed the land to be sold for taxes. Upon bill by B. to rescind the contract and enjoin the judgment, the grantor now being unable to convey a good title, *held*, that the loss was B.'s, and that the bond should be reformed so as to substitute B. for A., according to the real agreement of the parties. *Bradford v. Union Bank of Tennessee*, 13 How., 57.

MONEY.

[Bills of Credit, see CONSTITUTION AND LAWS. See BANKS; BILLS AND NOTES.]

I. IN GENERAL, §§ 1-48.

II. UNITED STATES TREASURY NOTES, §§ 49-125.

I. IN GENERAL.

SUMMARY — *Contract made in one country and sued on in another*, § 1.—*Sterling debt*, § 2.—*Notes issued by a city*, § 8.

§ 1. Where a contract is made in one country for a sum of money payable in the currency of that country, and a suit is brought in another country for the money, the amount to be recovered is such sum in the currency of the country where the suit is brought as is equivalent to the amount contracted to be paid in the currency of the contract computed at the then rate of exchange. *Hargrave v. Creighton*, § 4.

§ 2. In an action in 1868, on a debt of £849 6s., the evidence showed that at the time of the breach the pound sterling was worth \$11 in United States currency, and at the time of the hearing \$6.64. The court was of opinion that the only safe rule was to compare the pound and the dollar, in a case of this kind, upon a gold basis, and that the measure of damages would be the amount of the claim computed in our money at the real par of exchange at the time of the hearing, which was \$4.86. The question whether the plaintiff could lawfully refuse a tender of notes on the ground of the unconstitutionality of the legal tender acts, left undecided. *Reiser v. Parker*, §§ 5, 6.

§ 3. A provision in the charter of a municipal corporation that it shall have power to contract and be contracted with, with "all the rights, franchises, capacities and powers appertaining to municipal corporations," is not such an express grant of power as to enable such corporation to issue small bills to circulate as currency, when it is against the public policy and express law of the state for a person or corporation so to do. Nor is charter power to borrow money and give municipal bonds such an express grant of power. And where bills are thus illegally issued by a public corporation, the holder cannot recover back the consideration given therefor, for he is charged with notice of the wrong, and *in pari delicto* with the officers

so wrongfully issuing them. Nor will a law, passed in aid of the rebellion, requiring their redemption, validate such notes. But where notes or bills are illegally issued by a private corporation, the holder who is not *in pari delicto* may recover back the consideration given for them, as money had and received. *Thomas v. City of Richmond*, §§ 7-10.

[NOTES.—See §§ 11-48.]

HARGRAVE v. CREIGHTON.

(Circuit Court for Georgia: 1 Woods, 489-498. 1873.)

Opinion by Woods, J.

STATEMENT OF FACTS.—This action is founded on several bills of exchange. The following is a copy of one of them:

“£166. 13. 4.

MANCHESTER, May 2, 1870.

“Nine months after date, pay to our order one hundred and sixty-six pounds, thirteen shillings and four pence, for value received.

“GEO. J. HARGRAVE & Co.

“To Messrs. HUGH CREIGHTON & Co., 883 Belfast.

“Payable in London.”

The other bills are similar, save in amount and time of payment. The bills show that the contracts were made and were to be performed in England. It is admitted that the verdict must go for the plaintiff. The only question controverted is, What ought to be the amount of the verdict? Upon this point plaintiff has introduced the testimony of a witness, who swears that it would require the sum of \$6,053.49 to purchase a bill of exchange on London for £1,078 16s. 9d. This is twenty-six and one-fourth per cent. more than the face value of the bills sued on, and is made up partly in exchange and partly in the premium on gold. The plaintiff claims that he is entitled to this twenty-six and one-fourth per cent., and the defendant denies it.

§ 4. *When a contract is made in one country for a sum of money payable in the currency of that country, and a suit is brought in another country for the money, the amount to be recovered is such sum as will be equivalent to the amount contracted to be paid in the currency of the contract.*

The question whether, in a case similar to this, the plaintiff would be entitled to exchange, has been decided adversely to the claim in the courts of New York. Thus in *Scofield v. Day*, 20 Johns., 102, where a promissory note was drawn at Montreal, in the British Province of Lower Canada, payable to parties residing in England, it was held that in a judgment obtained on a note in a court of the state of New York, the plaintiffs were not entitled to any allowance for the current rate of exchange in England at the time of the judgment.

So in *Marvin v. Franklin*, 4 Johns., 124, it was held that when a person in New York purchases goods in England, and is sued here, the creditor can recover the amount at the par of exchange only, and is not entitled to any allowance for the rate of exchange, or for the price of bills on England. The court said, “the debt is to be paid according to the par and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent, and the courts are not to inquire into the disposition of the debt after it reaches the hands of the agent.” The same doctrine was held in *Adams v. Cordis*, 8 Pick., 260, as the proper rule in all cases, except bills of exchange.

On the other hand, Mr. Justice Story says (Conf. of Laws, secs. 308, 309, 310): “When a contract is made in one country and is payable in the currency of that country, and a suit is afterwards brought in another country to

recover for the breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the two currencies, or according to the rate of exchange at the particular time existing between them. The proper rule would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not the nominal par of exchange. In all cases we are to take into consideration the place where the money is, by the original contract, payable; for, wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. Thus, if a note were given in England for £100, payable in England, or, what is the same thing, payable generally, then, in a suit in Massachusetts, the party would be entitled to recover, in addition to the \$444.44, the rate of exchange between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. If the exchange were below par, a proportionate reduction should be made, so that the party would have his money replaced in England at exactly the same amount he would be entitled to receive in a suit there."

In *Cash v. Kennion*, 11 Ves., 314, Lord Eldon held that if a man in a foreign country agrees to pay £100 in London upon a given day, he ought to have that sum there on that day, and if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed. Mr. Justice Washington, in the case of *Smith v. Shaw*, 2 Wash., 167, in a suit brought by an English merchant on account for goods shipped to the defendant's testator, where the money was doubtless to be paid in England, and the question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held that the debt was payable at the then rate of exchange. See, also, *Grant v. Healy*, 3 Sumner, 523; *Dungannon v. Hackett*, 1 Eq. Cas. Abr., 288; *Ekins v. East India Co.*, 1 P. Wms., 395.

It seems to me, not only that the weight of authority, but the weight of reason, is with the plaintiff on this question. The defendants agree to pay their debt to the plaintiffs on a day certain, in London. They break their contract and remove to America, where the plaintiffs are compelled to follow them. Is not the plaintiff entitled to the same fruits of his contract at the hands of a court of justice as if the contract had been kept? And ought the defendants to be allowed, by breaking their contract, to make it any the less valuable to the plaintiff, and ought they to derive benefit from their own wrong in violating their promise by being allowed to pay their debt in a cheaper currency than would have been required had they kept their contract? These questions, it seems to me, should be answered in the negative.

The legal tender act cannot affect this question. The point is, What is due from the defendants to the plaintiff on their contract? When that is ascertained, the amount is solvable in currency. Let the verdict be for \$6,053.49, the amount claimed by plaintiffs.

REISER v. PARKER.

(Circuit Court for Massachusetts: 1 Lowell, 262-266. 1868.)

STATEMENT OF FACTS.—This was a suit on a debt of £849 6s., due on account to plaintiff, a subject of Great Britain. The only question was as to the rate of exchange as affecting the measure of damages. It was in evidence that the pound sterling was, at the time of the breach, worth \$11 in United States currency, and at the time of the hearing worth \$6.64. According to the course of dealing between plaintiff and defendant's intestate, the money, if it had been paid, would have been remitted at once to London.

Opinion by LOWELL, J.

The decided cases and the principles of law and of the theory and practice of exchange which bear upon the case have been carefully and ably presented to us in the arguments of counsel, to which we must admit our great obligation. The plaintiff contends that we must treat the pound sterling as merchandise and assess its value, at the time of the breach, in the most usual currency of this country, according to the judgment in *Essex Co. v. Pacific Mills*, 14 Allen, 389; or, if not, that we must assess his damages according to the rate of exchange reckoned in currency. The defendant insists that we must give the real par of exchange in all cases. He contends, besides, that the legal tender acts are unconstitutional, and so the assessment must be in gold.

The question whether, in an action for a debt payable in another state or country, not being a bill of exchange, the damages are to be so assessed as to give the rate of exchange prevailing in the country where the suit is brought, has been decided differently by different courts. The cases cited, or which we have found in favor of the allowance, are *Smith v. Shaw*, 2 Wash., 167; *Cropper v. Nelson*, 3 Wash., 125; *Lee v. Wilcocks*, 5 S. & R., 48; *Scott v. Bevan*, 2 B. & Ad., 78; *Delegal v. Naylor*, 7 Bing., 460. Mr. Justice Story and Chancellor Kent have expressed their opinions in favor of this rule. Story, *Conflict of Laws*, §§ 308-312; *Grant v. Healey*, 3 Sumn., 523 (*CONTRACTS*, §§ 1203-6); 3 Kent, Com. (5th ed.), 117, note *a*; and see *Cash v. Kenyon*, 11 Ves., 314.

On the other hand, it has been held that the par of exchange ought to be considered, without regard to the cost of remittance or the balance of trade, in the following cases: *Martin v. Franklin*, 4 Johns., 124; *Scofield v. Day*, 20 Johns., 102; *Adams v. Cordis*, 8 Pick., 260; *Alcock v. Hopkins*, 6 Cush., 484; *Burgess v. Alliance Co.*, 10 Allen, 228; *Weed v. Miller*, 1 McLean, 423 (*BILLS AND NOTES*, §§ 1622-23); *Cockerell v. Barber*, 16 Ves., 461.

The argument in favor of allowing the rate of exchange is that the plaintiff is entitled to have his money at the place agreed on. Against it, the reply is that the court can award only the debt due, and cannot inquire what the plaintiff intends to do with his money after he receives it, and cannot fix by its decree the day when he shall receive it. We do not make a careful examination of the arguments, or of the authorities, because in the present case the evidence is that exchange reckoned in gold was at par on the day to which most of the evidence was addressed, that is, the day of the date of the writ, meaning by par the actual value of the pound at our mint, or \$4.86; and the only witness who gives the value at the time of the hearing, gives a variation of less than two cents in a pound from the real par. And it is to be observed that the courts which adhere most firmly to the rule of the par of exchange have modified their views to meet the objections of Judge Story and Chancellor Kent, and now award the *actual par*, or \$4.86, and not the mere nominal

and obsolete par of \$4.44, which they originally adopted (*Bush v. Baldrey*, 11 Allen, 369; *Swanson v. Cook*, 45 Barb., 574); and thus agree to the correctness of the rule laid down in section 309 of the Conflict of Laws, that they are to "allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not the nominal par of exchange;" so that the only dispute now remaining is whether the fluctuations arising from the course of trade, which between England and this country, when both countries are trading on a gold basis, are comparatively insignificant, shall be regarded.

But in this case, as we have said, the evidence is that exchange reckoned in gold was at nine and a half to nine and three-fourths above the nominal par, which is equivalent to the real par of \$4.86, so that the question for us is whether the plaintiff is to be allowed \$4.86, or about \$11 for each pound sterling due him, that is, whether his damages are to be reckoned in gold or in paper. If not assessable at the high rate which prevailed at the date of the writ, the plaintiff would still contend for such an assessment as will now procure him £849 6s., say at from \$6.67 to \$7 to the pound.

§ 5. *The measure of damages of a debt payable in pounds sterling is the intrinsic value of the pounds in our dollars.*

The difficulty in the case arises out of the fact that we have two currencies, one of which, unfortunately, does not possess the steadiness of value which is the first requisite for the standard of other values. In this case, for example, if the pound is reckoned in paper at the date of the breach, the plaintiff will now obtain about £1,300 in gold for the £850 due him; while, on the other hand, if his debt shall be reckoned in gold and paid in paper at its present value, he will receive only about £600 for the same debt. Exact justice, if we could administer it, would seem to be met by ordering him to receive an approved bill of exchange for £849 6s. and interest, or such a sum of money as on the day of payment, if we could foretell it, would buy such a bill. As we can neither oblige the defendant to give nor the plaintiff to receive a bill of exchange, we must reckon his damages in our money.

§ 6. *A gold basis.*

And it seems to us that the only safe rule is to compare the pound and the dollar in a case of this kind upon a gold basis. This is the rule adopted in *Hussey v. Farlow*, 9 Allen, 263; *Bush v. Baldrey*, 11 Allen, 369; *Swanson v. Cooke*, 45 Barb., 574; *Ross v. The Patrick Henry*, Dist. Ct. S. Dist. N. Y., July, 1867, Shipman, J. The pound sterling has always been treated as money here, though foreign money, as a standard of value and not as a commodity. Up to 1857 it was a legal tender in the payment of debts, and its value is still fixed by law for estimates at the custom-house and for payments by and to the treasury. Stat. 27th July, 1842, 5 Stats., 496. Its value has a known and precise relation to that of our coin, so much so as to have become a question for the court rather than the jury, but it has none to our paper, because the latter is constantly fluctuating. We think it would be unsafe, and on the whole likely to work injustice, if this value were to be considered an open question in each case. The evidence is that the persons who deal in remittances almost always make their quotations in gold. They have found that to be the only safe and prudent course, and we find it so.

This is not a contract to deliver foreign coin here at a certain day, and there is no presumption of law or fact that a creditor in England having an open

account with a person here for goods sold, would, on the day it became due by demand of payment, remit to himself in England if the debtor failed to do so. His damages are the amount of his debt, and not what the debtor might then have been obliged to pay in a depreciated currency to liquidate it. We know that, in fact, the pound has not changed its value, but has only seemed to change, and the practical difficulty for us is to follow the fluctuations. If we give judgment to-day for a certain sum, and it is paid in paper, we cannot tell that the amount may not by the time of payment be much more or much less than the equivalent of the plaintiff's pounds.

The validity of what is called the legal tender law has been argued by only one of the parties to this cause, and in the view which we have taken is not involved in its decision. If the plaintiff desires to raise that question, he can do so when payment is made or offered upon the judgment, by refusing a tender of notes.

Judgment accordingly.

THOMAS v. CITY OF RICHMOND.

(12 Wallace, 349-358. 1870.)

ERROR to U. S. Circuit Court, District of Virginia.

STATEMENT OF FACTS.—By the statute of Virginia it was made a criminal offense for any person to issue any note or other security with intent to create a circulating medium, etc., and it was made an offense to pass or receive such notes or securities. In 1861 the city of Richmond issued \$300,000 in notes, and in 1862 a body acting as a legislature, and representing a part of the state, declared the notes valid. After the close of the rebellion the city refused to pay the notes, and certain holders of notes brought *assumpsit* against the city. Judgment for defendant.

Opinion by MR. JUSTICE BRADLEY.

First. The court finds as a fact that the notes upon which the present action is brought were issued to circulate as currency; and, as matter of law, that this was in violation of the law and policy of Virginia; and that, therefore, the notes were void.

The first question is, whether the issue of notes as currency by the common council of the city of Richmond, in April, 1861, was against the law and policy of Virginia. The issue of notes as a common currency or circulating medium is guarded with much jealousy by all governments as touching one of its most valuable prerogatives, and as deeply affecting the common good of the people. Almost every state has stringent laws on the subject, and it may be said to be against the public policy of the country to allow individuals or corporations to exercise this prerogative without express legislative sanction. The state of Virginia, like all the other states, had a law of this kind in operation at the time the notes in question were issued. The issue of the notes in question was clearly in violation of this law; and it will be perceived that the seventeenth section makes the receipt of such notes in payment, as well as the issue and passing of them, a penal offense.

§ 7. *No implied power in a municipal corporation to issue notes to circulate as money.*

But the charter of the city of Richmond has been referred to for the purpose of showing that the common council had power to issue such notes. One of the grants of power relied on is, that the city is made a corporation with power to contract and be contracted with, and generally with "all the rights,

franchises, capacities and powers appertaining to municipal corporations." In a community in which it is against public policy, as well as express law, for any person or body corporate to issue small bills to circulate as currency, it is certainly not one of the implied powers of a municipal corporation to issue such bills. Such a corporation "can exercise no power which is not, in express terms or by fair implication, conferred upon it." *Thomson v. Lee County*, 3 Wall., 330 (Bonds, §§ 1669-72). Another clause of the charter to which reference has been made authorizes the council to borrow money and to issue the bonds or certificates of the city therefor. But this cannot be seriously urged as conferring the right to issue such bills as those now in suit. Such city securities as those authorized by the charter are totally different from bills issued and used as a currency or circulating medium. The distinction is well understood and recognized by the whole community. A power to execute and issue the one class cannot, without doing violence to language, be deemed to include power to issue the other. We do not hesitate to say, therefore, that the common council of Richmond had no power or authority to issue such paper, and that they could not bind the city thereby.

§ 8. *In the case of illegal notes issued by private corporations, the holder, who is not in pari delicto, may recover back the consideration given to such individual or corporation for them as money had and received.*

It is contended, however, that although the notes themselves should be deemed void, yet the city received the money therefor, and ought not, in conscience, to retain it; and, therefore, that the action can be maintained on the count for money had and received. If the defendant were a banking or other private corporation, and had issued notes contrary to law, and had incurred penalties therefor, no penalty being imposed upon the receiver or holder of the notes, this argument might be sound. In the case of *Oneida Bank v. Ontario Bank*, 21 N. Y., 496, in which the defendant had issued post notes contrary to a statute of New York, it was held that the holder could recover the money advanced therefor. "The argument for the defendant against this position," says Chief Justice Comstock, "rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. . . . But such were not the relations of the parties. . . . Whatever there was of guilt, in the issuing of the drafts, it was the creature of the statute. . . . By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced only against the individual banker, or the officers, agents and members of the association. . . . If the issuing of the drafts was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant." This is in accordance with the general principles of law on this subject. Lord Mansfield, in *Smith v. Bromley*, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: "If the act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto*; but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover." 2 Dougl., 696, n. In that case the plaintiff had given the defendant money to sign her brother's bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle has been frequently

recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to *Smith v. Bromley*, id., 697*a*, thus sums up the result of the cases: A recovery can be had as for money had and received (1st) where the illegality consists in the contract itself, and that contract is not executed — in such case there is a *locus pœnitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party; (2d) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence in such illegal conduct — in such cases there is no *parity of delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed. See the cases collected in 2 Comyn on Contracts, 108–131; 1 Selwyn's *Nisi Prius*, 87–100; 3 Phillips on Evidence, 119; 2 Greenleaf on Evidence, § 121, p. 120; Chitty on Contracts, 550, 552, 553, and notes.

Now, in cases of bills, or other obligations, illegally issued by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations and also retain the proceeds. Hence, where the parties are not *in pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law, and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them. But if the parties are *in pari delicto*, as if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves.

§ 9. — *otherwise where the notes are issued by a municipal corporation.*

But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the state to issue them. It was a penal offense in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power, to issue them.

§ 10. *An act of the legislature of one of the late Confederate States, authorizing and requiring the redemption, in aid of the rebellion, of notes illegally issued by a municipal corporation, is void and does not validate such notes.*

It was insisted further, however, that the legislature, in March, 1862, passed laws which authorized, and even required, the city to redeem these bills. But, secondly. The court found that these laws were passed by a legislature not recognized by the United States and in aid of the rebellion, and, therefore, that these notes were not made valid thereby.

The fact thus found, that the laws referred to were passed in aid of the rebellion, is conclusive on the subject. We have already decided, in *Texas v. White*, 7 Wall., 700 (Const., §§ 140-60), and just now in the case of *Hanauer v. Doane*, 12 Wall., 342, that a contract made in aid of the rebellion is void, and cannot be enforced in the courts of this country. The same rule would apply, with equal force, to a law passed in aid of the rebellion. Laws made for the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the rebellion, though made by a *mère de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them. But laws made to promote and aid the rebellion can never be recognized by, or receive the sanction of, the courts of the United States as valid and binding laws. To recognize them as such would be derogatory to the dignity and authority of the government of the United States, and would be setting too light an estimate upon so great an offense.

Judgment affirmed.

§ 11. *In general.*—The legal effect of a bill of exchange is that it is payable in money in the current coin of the country. *Olshausen v. Lewis*, 1 Biss., 419.

§ 12. A vessel was lost on the Canada side of the Niagara river, and the master reported that she was worth at the time a certain sum in Canadian currency, and that gold, or Canadian currency, was at a certain premium over United States notes. *Held*, that the libellant was entitled to recover in United States notes the value of the vessel as computed in such foreign currency. *Councer v. The Griffin*,* 5 Am. L. Reg. (N. S.), 45.

§ 13. The proceeds of a whaling voyage were received partly in gold and partly in currency, and advances were made to the libellant, who was entitled to a lay of one forty-second part of the catchings, in gold. The owners made up the account of the voyage in currency, allowing the premium on the gold received, and charging it on the gold advanced. *Held*, (1) that the account was properly made up; (2) that if the account was so made that the libellant received his share of one forty-second part, it would be rightly made in either currency; (3) that the gold advanced the libellant could not be charged at its face value only, if by so doing he would receive more than his forty-second part of the proceeds; (4) that a tender having been made to the libellant, before suit, in accordance with the method of accounting sanctioned by the court, he must be refused costs, unless it should develop that a mistake had been made by the respondents in computing the amount tendered. *Carter v. Swift*,* 1 Low., 398.

§ 14. In a note executed in 1859, the word "dollars" means lawful money of the United States. *Stoughton v. Hill*, 8 Woods, 404.

§ 15. Where a bill of lading stipulated that freight should be paid "at the current rate of exchange for banker's sight bills on London at the date of the steamer's report at the custom-house" at New York, and the freight reserved by the bill was expressed in English money, the respondent's exception on the ground that in computing the freight the premium on gold had been allowed was overruled, the court holding that, there being no stipulation for gold, the

freight was payable in the current money of this country, to be such a sum as would be sufficient to buy the bills on London designated. *Hus v. Kempf*,* 10 Ben., 364.

§ 16. The plaintiff, an American citizen, shipped at St. Johns, New Brunswick, on board an American vessel. The shipping articles were for a voyage to end at a port in the United States, and the rate of wages specified \$25 per month. *Held*, that he was entitled to recover the contract price in United States money, and not a sum in United States currency equal to the contract price if paid in the currency of St. Johns; that dollars in the contract does not necessarily mean dollars in paper currency, and that no question of the relation of one currency to another was involved in the case. *Trecartin v. Ship Rochambeau*,* 2 Cliff., 465.

§ 17. Exchange.—A judgment for a sterling debt should be computed at the rate prevailing at the time of the trial, and not at the par of exchange. *Smith v. Shaw*, 2 Wash., 167.

§ 18. In suit on a promissory note payable at an Indiana bank, with the rate of exchange between the place of payment and the city of New York, the Indiana bank having suspended specie payment, *held*, that the current price of drafts, in specie, or its equivalent on New York at the place of payment at the time the note became payable, must give the rate of damages for the difference of exchange between the two places. *Balch v. Colman*, 2 McL., 85.

§ 19. Although exchange may be recovered on a bill of exchange payable at a particular place, it seems that in an action brought in one state upon a promissory note given in another, no place of payment being named in the instrument, no exchange can be recovered. *Weed v. Miller*, 1 McL., 423.

§ 20. On note for sterling money dated in Ireland, the declaration was for sterling money. The court, under the act of assembly of Virginia authorizing them to settle the rate of exchange between Ireland and England, determined that Irish is turned into English sterling by deducting one-thirteenth of the Irish, and English is turned into Irish by adding one-twelfth of the English. *Bond's Executors v. Grace's Executors*, 1 Cr. C. C., 96.

§ 21. In the absence of an agreement to that effect, debts collected in one state, in the currency of that state, cannot be applied to the payment of creditors in another state on debts contracted in such other state, in the currency of the state where collected. Where defendants, being indebted to H., of New York, placed in his hands notes on persons in Illinois, and H. in collecting was obliged to bring suit on some of the notes, and to receive Illinois currency for all, *held*, that in applying the proceeds to the account of defendants, H. was entitled to make allowance for the rate of exchange between Illinois and New York, also for his commission for and expenses of collecting. *Howe v. Wade*,* 4 McL., 819.

§ 22. Bank-bills.—The constitution of the United States recognizes only gold and silver as a legal tender; hence if a marshal receive bank-notes in satisfaction of an execution, he must account to the plaintiff in gold and silver. *Gwin v. Breedlove*, 2 How., 29. See BANKS; BILLS AND NOTES.

§ 23. Where a bank-bill is presented, and payment demanded and refused, it may be protested and sued upon by the holder; but if after such protest the bill is passed to another, it becomes again a circulating medium, and cannot be sued upon by the then holder without demand and protest. *In re Bank of North Carolina*,* 2 Hughes, 373.

§ 24. Bank-notes are not money. Thus on an indictment for cheating one H. of \$90 of his money at cards, the proof showed that bank-notes were won. *Held*, that the proof did not support the indictment. *United States v. Wells*, 2 Cr. C. C., 43.

§ 25. As a general rule a payment received in forged paper or in any base coin is not good; and if there be no negligence in the party he may recover back the consideration paid for them, or sue upon his original demand; but this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash, and afterwards discovered to be forged. *United States Bank v. Bank of Georgia*, 10 Wheat., 333.

§ 26. The doctrine that bank-bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not. *Ward v. Smith*, 7 Wall., 447.

§ 27. Where, during the late rebellion, debtors in the Confederate States attempted to discharge debts to creditors in the loyal states by paying the agents of the latter in Confederate bonds, or in Virginia bank-notes, Confederate bonds being the security for such notes, *held*, that the receipt by such agents of the aforesaid bonds and notes was no payment; that the debtors had no right to pay, and the agents no right to receive, anything but legal currency of the United States. *Fretz v. Stover*, 22 Wall., 198.

§ 28. Where half of a bank-note is lost, the holder may recover the whole amount on indemnifying the bank against the claim of any other person upon the lost half. *Armat v. Union Bank of Georgetown*, 2 Cr. C. C., 180.

§ 29. Where the *bona fide* holder of bank-notes divided each note into halves for the purpose of safety in shipping, and lost one set of the halves, *held*, that the right to the property was not lost by losing the evidence of it, and that he was entitled to recover the full amount of the notes, as subsequent holders, even for value, of the lost portion of the mutilated bank-notes, would take with notice, and subject to all defenses. *Bullet v. Bank of Pennsylvania*,* 2 Wash., 172.

§ 30. A bank is obliged to pay its outstanding bills, although only the half of each bill is presented, if the person presenting such half bills proves himself to be the legal owner; and that notwithstanding the fact that the bank has notified the public that it will not pay any bills cut into parts, unless all the parts are brought together. *Martin v. Bank of the United States*,* 4 Wash., 253.

§ 31. The holder of a bank-note, which has been lost by, or stolen from, the owner, is entitled to recover thereon if such note was taken for a valuable consideration in the usual course of business, *bona fide*, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that the note had been lost by, or stolen from, the rightful owner, and was not the property of the person who then held it. Otherwise, if it was taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution and led him to make further inquiry. *City Bank v. Farmers' & Planters' Bank*,* Taney, 119.

§ 32. It is no defense in an action that the consideration of the contract consisted of bills issued by a bank whose charter was illegal, and that such bills were illegal from the time of their issue, and afterward became worthless in fact, it appearing that the bills were current and in circulation at the time defendant received them, and were used by him in the payment of his debts, and there being no proofs that he is under any obligation to account for the amount of the bills to the creditors to whom he paid them. *Orchard v. Hughes*,* 1 Wall., 73.

§ 33. Where payment is demanded of a bank of its bills in specie, the bank is bound to pay the amount demanded in specie, and to have its specie counted or weighed, or to have a sufficient number of servants to count and pay it out on proper demand. On such demand a tender of foreign coins, except by weight, is not good. Nor is a tender of a draft, nor of bills, even the bills of the bank making the demand. Thus where an agent of a Boston bank presented to a bank at Bath bills of the latter bank for payment, and refused tender of a draft and of bills of banks in Boston, as well as bills of the bank he represented, whereupon the cashier spent the entire day in counting out small pieces of silver change, without counting out a third of the amount of the demand, which was but for \$3,000, *held*, that this was such a refusal on the part of the bank to pay its bills on demand as to bring the case within an act of Massachusetts providing that interest of two per cent. per month could be collected on such claims, after refusal by bank to pay bills on demand. *Suffolk Bank v. Lincoln Bank*,* 8 Mason, 1.

§ 34. *Sterling debt.*— In action on a note for pounds sterling, *held*, that, under the act of March 3, 1873 (sec. 8565, R. S.), which provides that, "in the construction of contracts payable in sovereigns or pounds sterling," a pound shall be valued at \$4.8665, the value of the pound sterling need not be averred or proved, but that the court will give judgment for the amount of the note converted into United States money in accordance with the statute ratio. *King v. Hamilton*, 12 Fed. R., 478.

§ 35. Where a contract of affreightment provided for the transportation of ninety sovereigns British sterling from Australia to New York, the ship-owner to receive as compensation two pounds sterling, upon failure to deliver according to contract, *held*, that the shipper recover \$684.50, the value of the sovereigns in the New York market at the time they should have been delivered, less \$3.88, the value of the two pounds freight money, computed at the rate fixed by congress for establishing the value of English money in commercial transactions in this country. *The Ship Patrick Henry*,* 1 Ben., 292.

§ 36. *Counterfeit money.*— A collector of revenue is liable for counterfeit money received by him for duties. *United States v. Morgan*, 11 How., 154.

§ 37. *Notes issued by a city.*— Although notes issued for circulation as money by a city without authority of law may perhaps be rendered valid by subsequent legislative action, authorizing the issue of such notes, they are nevertheless void, although thus sanctioned, if issued in aid of the rebellion. *Evans v. City of Richmond*, Chase's Dec., 551. See §§ 7-10.

§ 38. *Adjusting debts on scale of depreciation.*— A contract entered into in 1779, for the payment of an annual ground rent of £26 current money of Virginia, paper money as well as gold and silver being then current, is within the second section of the act of the Virginia assembly, 1781, chapter 22, providing that debts in current money of this state or of the United States . . . shall be liquidated, settled and adjusted agreeably to a scale of depreciation hereinafter mentioned and contained;" and under the fifth section of the above act, empowering the court to adjust claims in certain cases where an application of the scale would be

unjust, the court decreed that the rent reserved ought to be reduced to such a sum in specie as the property conveyed was at the date of the contract actually worth. (*Reversing Marsteller v. Faw*,* 1 Cr. C. C., 117.) *Faw v. Marsteller*,* 2 Cr., 10.

§ 89. *Foreign coin—Duties.*—The valuation of foreign standard coins for purposes of estimating duties on imports is regulated under the act of March 3, 1873, by the annual proclamation of the secretary of the treasury, which is binding on collectors of customs and importers, no evidence being receivable to show that it is inaccurate. *Cramer v. Arthur*, 13 Otto, 612.

§ 40. But where the invoice is made out in a depreciated foreign currency, the parties may, under section 2903, Revised Statutes of the United States, have the benefit of a consular certificate attached to the invoice, showing the depreciation of the value of such currency, and such certificate when attached is conclusive and cannot be contradicted by affidavits as to its inaccuracy. *Ibid*.

§ 41. Where a seaman ships in a foreign country at so many dollars per month in the currency of that country, and, having completed the voyage before the expiration of the period for which he shipped, goes upon another voyage which terminates in the United States, without signing new articles, such period having terminated before the second voyage was completed, *held*, that upon his arrival in the United States he was entitled to such sum in the United States currency as would make the payment equal to specie. *Trecartin v. Ship Rochambeau*, 26 Law Rep., 564.

§ 42. When payment of wages is made to an American seaman at a foreign port, in foreign coin, on the sale of the ship, the breaking up of the voyage, or the discharge of the seaman by the master, such coin is to be valued at its rate in the home port, under the laws of the United States; but foreign coin is to be estimated at its value at the place of payment, if the payment is a voluntary advance on the part of the master, made with the assent of the seaman. *The Cabot*, Abb. Adm., 150.

§ 43. A certificate of deposit, to pay which there are funds in bank, and which is paid on presentation, is money; and an agent employed to borrow money upon a promissory note placed in his hands, who takes such certificate, does not exceed his authority. *Poorman v. Woodward*, 21 How., 266.

§ 44. *Debt payable in gold.*—Where a master receiving advances in a foreign port to defray expenses of the vessel promised the parties making the advances that the amount should be paid in gold, and gave a draft on the owners, payable in gold, which was not, however, accepted as payment, *held*, upon libel filed against the vessel for the sum advanced, that the decree must be for such amount in gold. *The Steamer Emily B. Souder*, 3 Ben., 159.

§ 45. On a contract to pay "in the paper of the M. E. Company, or its equivalent," the plaintiff can only recover the specie value of the notes of such company at the time the payment should have been made. *Robinson v. Noble*, 8 Pet., 181.

§ 46. *Agents.*—Without special authority an agent can only receive payment of the debts due his principal in the legal currency of the country, or in bills which pass as money at their par value by common consent of the community. *Ward v. Smith*, 7 Wall., 447.

§ 47. *Checks.*—A collector of the customs is not authorized to receive anything in payment of a duty bond but the lawful money of the United States or foreign gold or silver coins, made current by law. If he receive a check upon a bank, that is not payment of the bond until the check is paid. *United States v. Williams*, 1 Ware, 173.

§ 48. Where judgment was rendered for federal money, whereas the terms of the contract called for "lawful money of the state of Virginia," *held*, not to be error. *Cocke v. Kendall*, Hemp., 236.

II. UNITED STATES TREASURY NOTES.

SUMMARY—*Legal tender acts constitutional*, § 49.—*Contracts to pay in coin*, §§ 50, 51.—*Redemption of treasury notes*, §§ 52, 55.—*Subject to equities after maturity*, §§ 53, 54.—*Notes put into circulation without lawful authority*, § 56.

§ 49. The legal tender acts of 1862 are constitutional and valid, and are applicable to contracts made before as well as after their passage. (*Hepburn v. Griswold*, 8 Wall., 603, overruled. CHASE, C. J., with NELSON, CLIFFORD and FIELD, JJ., dissented.) (*Legal Tender Cases*.) *Parker v. Davis*, §§ 57-76.

§ 50. Express contracts to pay coined dollars can only be satisfied by the payment of coined dollars, and judgment in suits brought on such contracts may be entered for coined dollars and parts of dollars. Thus, where a bond was given in 1851, for the payment of a certain sum in gold and silver coin of the United States, interest payable also in coin, and tender of the

amount due thereon was made in United States notes issued under the loan and currency acts of 1862 and 1863, *held*, that such tender was not sufficient in law. *Bronson v. Roden*, §§ 77-81.

§ 51. Payment in gold, since the legal tender act, may be implied from the terms of a contract, but that implication must be collected from the contract itself. What the parties "thought" or "expected" cannot be held to control the plain meaning of the contract. Reference, however, may be allowed to surrounding circumstances, as in the case of other contracts, for the purpose of ascertaining the subject-matter of the contract, or for an explanation of the terms used, but not for the purpose of adding a new and distinct undertaking. Thus where a state largely interested in a railroad lent the railroad company its sterling bonds, the interest of which was payable abroad in coin, an implication that the company is to pay the state gold instead of currency could not be inferred from the fact that, unless such interpretation should be placed upon the contract, the state would not have exacted from the company all that was necessary to completely indemnify itself. *Maryland v. Railroad Co.*, §§ 82-84.

§ 52. The holder of treasury notes issued under the act of July 17, 1861, demanded from the secretary of the treasury payment thereof in gold, which was refused. The holder then accepted legal tender notes as payment, but under protest, and surrendered the treasury notes to be canceled. *Held*, that the protest, being unauthorized by law, had no legal efficacy to qualify the surrender, and that the holder by said acceptance and surrender waived all claim to the difference between the value of gold and legal tender notes, notwithstanding his protest. *Savage v. United States*, §§ 85-88.

§ 53. A party receiving United States treasury notes or bonds (not legal tender) after maturity takes them subject to the rights of prior holders the same as in cases of other paper bought and sold, the notes being negotiable paper and subject to the law of commercial paper. *Vermilye v. Adams Express Co.*, §§ 89-91.

§ 54. Bankers and brokers cannot establish by proof a usage or custom in dealing in negotiable paper which in their own interest contravenes commercial law. Thus, where treasury notes payable to holder or bearer at a fixed date were stolen from an express company, and it paid the owner therefor, *held*, that the company was entitled to recover them from a party to whom they had been negotiated, in the course of business, after maturity. *Ibid.*

§ 55. Under the act of August 12, 1866 (14 Stat., 31), providing for the redemption of treasury notes, the secretary of the treasury was alone authorized to redeem them, and payment of any of them by an assistant treasurer did not retire them within the meaning of the act without further order of the secretary of the treasury; and until such order is given the government is not regarded as accepting such notes or adopting them as genuine. Thus where treasury notes were sold to the assistant treasurer at New York, and were by stamp upon their back made payable "to the order of the secretary of the treasury for redemption," the notes being delivered to the assistant treasurer on different days between September 20 and October 8, and on October 5 the discovery was made at the treasury department that the notes were spurious, whereupon they were returned to the assistant treasurer at New York, October 12, and notice given to the vendor of the notes the following day, *held*, that the acceptance of the forged notes by the assistant treasurer did not bind the government, such assistant treasurer not being authorized to retire the notes under the law, and that upon the receipt of the notes at the treasury department there was no such unreasonable delay in their return as to preclude the government from recovering back the money paid for them. *Cooke v. United States*, §§ 92-97.

§ 56. The ruling of the district judge that if notes purporting to be treasury notes were printed in the department and all ready for issue, yet if they were not in fact issued by some officer authorized so to do, the United States is not bound to redeem them under the act of August 12, 1866, *held*, error. *Ibid.*

[NOTES.—See §§ 98-125.]

LEGAL TENDER CASES.

KNOX v. LEE — PARKER v. DAVIS.

(12 Wallace, 457-481. 1870.)

STATEMENT OF FACTS.—In the first of these cases Mrs. Lee, a citizen of Pennsylvania, sued Knox in trespass for taking and converting a flock of sheep, and recovered a judgment. The sheep were in Texas on the breaking out of the rebellion, and were confiscated by the Confederate government and sold to Knox. The case was brought up on error to the circuit court for the western district of Texas.

In *Parker v. Davis* a bill was filed to compel the specific performance of a contract by Parker to convey a piece of land, and he was required by the decree of the court to make a deed on the deposit in court by Davis of the sum due in "greenbacks," or legal tender notes of the United States. The case was brought up by appeal from the supreme judicial court of Massachusetts.

Opinion by MR. JUSTICE STRONG.

The controlling questions in these cases are the following: Are the acts of congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that congress has no constitutional power under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which all must admit may, in certain contingencies, become indispensable, even if they were not when the acts of congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause throughout the country great business derangement, widespread distress and the rankest injustice.

The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measure of values. If now by our decision it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well founded distinction to be made between the constitutional validity of an act of congress declaring treasury notes a legal tender for the payment of debts contracted after its passage, and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable

in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the legal tender acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears.

§ 57. *Presumption in favor of acts of congress.*

A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by congress—all the members of which act under the obligation of an oath of fidelity to the constitution. Such has always been the rule. In *Commonwealth v. Smith*, 4 Binn., 123, the language of the court was, "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions, by the supreme court of the United States, by this court, and by every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt;" and, in *Fletcher v. Peck*, 6 Cranch, 87 (Constr., §§ 1805-12), Chief Justice Marshall said, "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of congress to show clearly that it is in violation of the provisions of the constitution. It is not sufficient for them that they succeed in raising a doubt.

§ 58. *In determining the nature and extent of the constitutional powers of congress, the objects for which they were granted should be kept in view.*

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the constitution upon congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin v. Hunter*, 1 Wheat., 326 (APPEALS, §§ 982-729), it was said, "The constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." And with singular clearness was it said by Chief Justice Marshall, in *McCulloch v. State of Maryland*, 4 id., 405 (Constr., §§ 380-98), "A constitution, to contain an accurate detail of all the subdivis-

ions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

§ 59. *The powers of congress should be regarded as related to each other, and all means for a common end.*

If these are correct principles, if they are proper views of the manner in which the constitution is to be understood, the powers conferred upon congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old confederacy.

§ 60. *Non-enumerated powers of congress.*

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in congress, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to congress and mentioned in detail. They embrace the execution of all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat., 414 (COURTS, §§ 734-45), "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case: "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." That would appear, then, to be a most unreasonable construction of the constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things, enumera-

tion and specification were impossible. But they were left to the discretion of congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

§ 61. *How the existence of congressional power may be deduced.*

And here it is to be observed it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the states, and proposed at the first session of the first congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the states had, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added." This was the origin of the amendments and they are significant. They tend plainly to show that, in the judgment of those who adopted the constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

§ 62. *Resulting powers under the constitution.*

And it is of importance to observe that congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capital or a presidential mansion, and so also is the penal code. This last is worthy of brief

notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because congress is authorized to coin money and regulate its value it cannot declare anything other than gold and silver to be money or make it a legal tender. Yet congress, by the act of April 30, 1790, entitled "An act more effectually to provide for the punishment of certain crimes against the United States," and the supplementary act of March 3, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightfully done, and the power thus exercised has been affirmed by this court in *United States v. Marigold*, 9 How., 560. This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The constitution orders an enumeration of free persons in the different states every ten years. The direction extends no further. Yet congress has repeatedly directed an enumeration not only of free persons in the states but of free persons in the territories, and not only an enumeration of persons but the collection of statistics respecting age, sex and production. Who questions the power to do this?

§ 63. *Instances in which congress has exercised a discretion in the choice of means.*

Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specially given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the constitution. Under the power to establish postoffices and post-roads congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of light-houses, breakwaters, and buoys, the registry, enrollment and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or

means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *McCulloch v. Maryland*, 4 Wheat., 416 (Constr., §§ 380-98), unanimously ruled that, in authorizing the bank, congress had not transcended its powers. So debts due to the United States have been declared by acts of congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the constitution. *United States v. Fisher*, 2 Cranch, 358 (Gov., §§ 839-42).

§ 64. *Construction of the clause conferring power to enact laws necessary and proper, etc.*

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the constitution have been construed by congress and by this court whenever such action by congress has been called in question. Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. In *United States v. Fisher*, 2 Cranch, 358, this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary because the end might be obtained by other means." "Congress," said this court, "must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. The government is to pay the debt of the Union and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." It was in this case, as we have already remarked, that a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to congress to be an eligible means to enable the government to pay the debts of the Union.

It was, however, in *McCulloch v. Maryland*, that the fullest consideration was given to this clause of the constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession, and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the constitution to congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Said Chief Justice Marshall, in delivering the opinion of the court: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." The case also marks out with admirable precision the province of this court. It declares that "when the law (enacted by congress) is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court (it was said) disclaims all pretensions to such a power." It is hardly necessary to say that these principles are received with universal assent. Even in *Hepburn v. Griswold*, 8 Wall., 603, both the majority and minority of the court concurred in accepting the doctrines of *McCulloch v. Maryland* as sound expositions of the constitution, though disagreeing in their application.

§ 65. *The legal tender acts were an appropriate means for carrying into execution the legitimate powers of the government.*

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender acts as unconstitutional we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect or executing any of the known powers of congress, or of any department of the government. Plainly, to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed when congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the war and navy departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the govern-

ment to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the constitution. It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the constitution. The degree of the necessity for any congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in congress, not here. Said Chief Justice Marshall, in *McCulloch v. Maryland*, as already stated, "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the legal tender acts could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes, which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the treasury rep-

resented to congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their work-shops and their business with families and debts to be provided for. The government could not pay them with ordinary treasury notes, nor could they discharge their debts with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common treasury notes in payment of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tenders gave them a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.

It may be conceded that congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted do not demand that the relationship between the means and the end shall be direct and immediate. Illustrations of this may be found in several of the cases above cited. The charter of a bank of the United States, the priority given to debts due the government over private debts, and the exemption of federal loans from liability to state taxation, are only a few of the many which might be given. The case of *Veazie Bank v. Fenno*, 8 Wall., 533 (Const., §§ 420-33), presents a suggestive illustration. There a tax of ten per cent. on state bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the chief justice, avowed that it is the constitutional right of congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of national banks; and that it cannot be questioned congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if state bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

§ 66. *Power to coin money.*

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the constitution. It is not claimed that any express prohibition

exists, but it is insisted that the spirit of the constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals, can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. *United States v. Marigold*, 9 How., 560. There an express power to punish a certain class of crimes (the only direct reference to criminal legislation contained in the constitution) was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect.

To assert, then, that the clause enabling congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the states the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over states and people. It was designed to provide the same currency, having a uniform legal value in all the states. It was for this reason the power to coin money and regulate its value was conferred upon the federal government, while the same power as well as the power to emit bills of credit was withdrawn from the states. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in congress. If the power to declare what is money is not in congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference.

In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the states and in the federal government, it was expressly denied to both, as well to the United States as to the individual states. And generally, when one of such powers was expressly denied to the states only, it was for the purpose of rendering the federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the states, that general power over the currency which the states had when the constitution was framed, was such denial not expressly extended to the new govern-

ment, as it was to the states? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people — when it is remembered that paper money was almost exclusively in use in the states as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof was understood as conveying general power over the currency, the power which had belonged to the states, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to “declare war.” The whole system of the transportation of the mails is built upon the power to establish postoffices and post-roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase, “to coin money and regulate the value thereof,” while insisting that it defines the material to be coined as metal, are compelled to concede to congress large discretion in all other particulars. The constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of congress to change it, and it seems to have been left to congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond from time to time with the market value of the same metal as bullion. How then can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the states of all power over the currency, be regarded as an implied prohibition to congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency rather than restraining.

§ 67. *Impairing the obligation of contracts.*

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the legal tender acts. It is that they are prohibited by the spirit of the constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when applied to contracts made after their passage. The argument assumes

two things,—*first*, that the acts do, in effect, impair the obligation of contracts, and *second*, that congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other, constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Apsden v. Austin*, 5 Ad. & Ell, N. S., 671; *Dunn v. Sayles*, id., 685; *Coffin v. Landis*, 10 Wright, 426. Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow.

But the *obligation* of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted. *Davies*, 28; *Barrington v. Potter*, Dyer, 81, b., fol. 67; *Faw v. Marsteller*, 2 Cranch, 29. No one ever doubted that a debt of \$1,000, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government. *Dobbins v. Brown*, 2 Jones (Penn.), 75; *Workman v. Mifflin*, 6 Casey, 362. We have been asked whether congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of congress, at least so far as relates to the means of payment. They are engagements to pay with lawful

money of the United States, and congress is empowered to regulate that money. It cannot, therefore, be maintained that the legal tender acts impaired the obligation of contracts.

Nor can it be truly asserted that congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must, operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair, the obligations of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the constitution or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon congress. But in fact, the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to congress. And this court has recognized no such distinction as is now attempted. An embargo suspends many contracts and renders performance of others possible, yet the power to enforce it has been declared constitutional. *Gibbons v. Ogden*, 9 Wheat., 1 (Constr., §§ 1183-1201). The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the constitution because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the constitution.

If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the constitution. As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

§ 68. *Taking private property for public use without just compensation or due process of law.*

Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to conse-

quential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit, laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act or an embargo been acted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had \$1,000 due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to \$1,000 of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of congress invalid merely because we might think its provisions harsh and unjust.

We are not aware of anything else which has been advanced in support of the proposition that the legal tender acts were forbidden by either the letter or the spirit of the constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in congress.

§ 69. *As to the argument that the unit of money value must possess intrinsic value.*

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender acts do not attempt to make paper a standard of

value. We do not rest their validity upon the assertion that their emission is coinage or any regulation of the value of money; nor do we assert that congress may make anything which has no value money. What we do assert is that congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar, but the gold or silver thing we call a dollar is in no sense a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII., almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

§ 70. *The legal tender acts are valid as applied to contracts made either before or after their passage.*

But without extending our remarks further, it will be seen that we hold the acts of congress constitutional as applied to contracts made either before or after their passage. In so holding we overrule so much of what was decided in *Hepburn v. Griswold*, 8 Wall., 603, as ruled the acts unwarranted by the constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. *Brisco v. Bank of Kentucky*, 8 Pet., 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of *Knox v. Lee* were substantially decided in *Texas v. White*, 7 Wall., 700 (Const., §§ 140-60).

Judgment in each case affirmed. (a)

(a) Contracts made before the passage of the legal tender act of 25th of February, 1862, had reference to coined money, and any law that would compel their discharge in any less valuable measure of value would impair the obligations of such contracts. Hence the legal tender act of 1862, so far as it would make United States notes a legal tender for debts contracted prior to its passage, is unconstitutional. (MILLER, SWAYNE and DAVIS, JJ., dissented on the ground that the power to make notes a legal tender, is nowhere forbidden to congress; but on the contrary may be fairly inferred from the war-making powers.) *Hepburn v. Griswold*,* 8 Wall., 603.

In *Julliard v. Greenman*, 110 U. S., 421, it is held that the act of May 31, 1878, providing for

Dissenting opinion by CHASE, C. J.

We dissent from the argument and conclusion in the opinion just announced.

The rule by which the constitutionality of an act of congress passed in the alleged exercise of an implied power is to be tried, is no longer, in this court, open to question. It was laid down in the case of *McCulloch v. Maryland*, 4 Wheat., 421 (CONSTR., §§ 380-96), by Chief Justice Marshall, in these words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional."

§ 71. *Whether an act of congress is a necessary and proper means of executing a constitutional power of congress is a judicial question; but congress determines the degree of necessity.* .

And it is the plain duty of the court to pronounce acts of congress not made in the exercise of an express power, nor coming within the reasonable scope of this rule, if made in virtue of an implied power, unwarranted by the constitution. Acts of congress not made in pursuance of the constitution are not laws.

Neither of these propositions was questioned in the case of *Hepburn v. Griswold*, 8 Wall., 606. The judges who dissented in that case maintained that the clause in the act of February 25, 1862, making the United States notes a legal tender in payment of debts, was an appropriate, plainly adapted means to a constitutional end, not prohibited but consistent with the letter and spirit of the constitution. The majority of the court as then constituted, five judges out of eight, felt "obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in congress, is inconsistent with the spirit of the constitution, and is prohibited by the constitution."

In the case of the *United States v. De Witt*, 9 Wall., 41, we held unanimously that a provision of the internal revenue law prohibiting the sale of certain illuminating oil in the states was unconstitutional, though it might increase the production and sale of other oils, and consequently the revenue derived from them, because this consequence was too remote and uncertain to warrant the court in saying that the prohibition was an appropriate and plainly adapted means for carrying into execution the power to lay and collect taxes.

We agree, then, that the question whether a law is a necessary and proper means to the execution of an express power, within the meaning of these words

the reissue by the treasury of legal tender notes which may have been returned to the treasury, is constitutional and valid, and that notes so reissued are a legal tender. The court (per MR. JUSTICE GRAY) says: "We are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of congress, consistent with the letter and spirit of the constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the power vested by this constitution in the government of the United States.' Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts." MR. JUSTICE FIELD dissented.

as defined by the rule — that is to say, a means appropriate, plainly adapted, not prohibited but consistent with the letter and spirit of the constitution,— is a judicial question. Congress may not adopt any means for the execution of an express power that congress may see fit to adopt. It must be a necessary and proper means within the fair meaning of the rule. If not such it cannot be employed consistently with the constitution. Whether the means actually employed in a given case are such or not the court must decide. The court must judge of the fact, congress of the degree of necessity.

A majority of the court, five to four, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration; and declares the legal tender clause to be constitutional; that is to say, that an act of congress making promises to pay dollars legal tender as coined dollars in payment of pre-existing debts is a means appropriate and plainly adapted to the exercise of powers expressly granted by the constitution, and not prohibited itself by the constitution, but consistent with its letter and spirit. And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. One closed an honorable judicial career by resignation after the case had been decided, after the opinion had been read and agreed to in conference, and after the day when it would have been delivered in court, had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion. The court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question.

Their convictions, however, remain unchanged. We adhere to the opinion pronounced in *Hepburn v. Griswold*. Reflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained, and in the importance of them to the country.

We agree that much of what was said in the dissenting opinion in that case, which has become the opinion of a majority of the court as now constituted, was correctly said. We fully agree in all that was quoted from Chief Justice Marshall. We had indeed accepted, without reserve, the definition of implied powers in which that great judge summed up his argument, of which the language quoted formed a part. But if it was intended to ascribe to us "the doctrine that when an act of congress is brought to the test of this clause of the constitution," namely, the clause granting the power of ancillary legislation, "its necessity must be absolute, and its adaptation to the conceded purpose unquestionable," we must be permitted not only to disclaim it, but to say that there is nothing in the opinion of the then majority which approaches the assertion of any such doctrine. We did indeed venture to cite, with approval, the language of Judge Story in his great work on the constitution, that the words necessary and proper were intended to have "a sense at once admonitory and directory," and to require that the means used in the execution of an express power "should be *bona fide*, appropriate to the end" (1 Story on the Constitution, p. 42, § 1251), and also ventured to say that the tenth amendment, reserving to the states or the people all powers not delegated to the United States by the constitution, nor prohibited by it to the

states, "was intended to have a like admonitory and directory sense" and to restrain the limited government established by the constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated. In thus quoting Judge Story, and in this expression of our own opinion, we certainly did not suppose it possible that we could be understood as asserting that the clause in question "was designed as a restriction upon the ancillary power incidental to every grant of power in express terms." It was this proposition which "was stated and refuted" in *McCulloch v. Maryland*. That refutation touches nothing said by us. We assert only that the words of the constitution are such as admonish congress that implied powers are not to be rashly or lightly assumed, and that they are not to be exercised at all, unless, in the words of Judge Story, they are "*bona fide* appropriate to the end," or, in the words of Chief Justice Marshall, "appropriate, plainly adapted" to a constitutional and legitimate end, and "not prohibited but consistent with the letter and spirit of the constitution."

There appears, therefore, to have been no real difference of opinion in the court as to the rule by which the existence of an implied power is to be tested, when *Hepburn v. Griswold* was decided, though the then minority seem to have supposed there was. The difference had reference to the application of the rule rather than to the rule itself.

The then minority admitted that in the powers relating to coinage, standing alone, there is not "a sufficient warrant for the exercise of the power" to make notes a legal tender, but thought them "not without decided weight, when we come to consider the question of the existence of this power as one necessary and proper for carrying into execution other admitted powers of the government." This weight they found in the fact that "an express power over the lawful money of the country was confided to congress and forbidden to the states." It seemed to them not an "unreasonable inference," that, in a certain contingency, "making the securities of the government perform the office of money in the payment of debts would be in harmony with the power expressly granted to coin money." We perceive no connection between the express power to coin money and the inference that the government may, in any contingency, make its securities perform the functions of coined money as a legal tender in payment of debts. We have supposed that the power to exclude from circulation notes not authorized by the national government might, perhaps, be deduced from the power to regulate the value of coin; but that the power of the government to emit bills of credit was an exercise of the power to borrow money, and that its power over the currency was incidental to that power and to the power to regulate commerce. This was the doctrine of *The Veazie Bank v. Fenno*, 8 Wall., 548 (Const., §§ 420-33), although not fully elaborated in that case. The question whether the quality of legal tender can be imparted to these bills depends upon distinct considerations.

§ 72. *The making of the treasury notes a legal tender was not a necessary or proper means to the carrying on of war, or to the exercise of any express power of the government.*

Was, then, the power to make these notes of the government — these bills of credit — a legal tender in payments an appropriate, plainly-adapted means to a legitimate and constitutional end? or, to state the question as the opinion of the then minority stated it, "Does there exist any power in congress, or in the government, by express grant, in execution of which this legal tender act

was necessary and proper in the sense here defined and under the circumstances of its passage?"

The opinion of the then minority affirmed the power on the ground that it was a necessary and proper means, within the definition of the court, in the case of *McCulloch v. Maryland*, to carry on war, and that it was not prohibited by the spirit or letter of the constitution, though it was admitted to be a law impairing the obligation of contracts, and notwithstanding the objection that it deprived many persons of their property without compensation and without due process of law.

We shall not add much to what was said in the opinion of the then majority on these points. The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the chief justice, when secretary of the treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion.

It was his fortune, at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes and received the sanction of congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to congress was the expedient of making the notes of the United States a legal tender suggested. He urged the issue of notes payable on demand in coin or received as coin in payment of duties. When the state banks had suspended specie payments, he recommended the issue of United States notes receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that "United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin," and after stating the financial measures which in his judgment were advisable, he added: "The secretary recommends, therefore, no more paper money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the constitution." At the session of congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly averse to this clause, but was very solicitous for the passage of the bill to authorize the issue of United States notes, then pending. He thought it indispensably necessary that the authority to issue these notes should be granted by congress. The passage of the bill was delayed, if not jeopardized, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion, when called upon by the committee of ways and means, that it was necessary (Letters of the Secretary of the Treasury to the Committee of Ways and Means, January 22 and 29, 1862; Spaulding's Financial History, pp. 27, 46, 54), and he was not sorry to find it sustained by the decisions of respected courts, not unanimous indeed, nor without contrary decisions of state courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so, just as unhesitatingly, if his favor to the legal tender clause had been at that time decided, and his opinion as to the constitutionality of the measure clear.

Was the making of the notes a legal tender necessary to the carrying on the war? In other words, was it necessary to the execution of the power to borrow money? It is not the question whether the issue of notes was neces-

sary, nor whether any of the financial measures of the government were necessary. The issuing of the circulation commonly known as greenbacks was necessary, and was constitutional. They were necessary to the payment of the army and the navy and to all the purposes for which the government uses money. The banks had suspended specie payment, and the government was reduced to the alternative of using their paper or issuing its own.

Now it is a common error, and in our judgment it was the error of the opinion of the minority in *Hepburn v. Griswold*, and is the error of the opinion just read, that considerations pertinent to the issue of United States notes have been urged in justification of making them a legal tender. The real question is, was the making them a legal tender a necessary means to the execution of the power to borrow money? If the notes would circulate as well without as with this quality it is idle to urge the plea of such necessity. But the circulation of the notes was amply provided for by making them receivable for all national taxes, all dues to the government and all loans. This was the provision relied upon for the purpose by the secretary when the bill was first prepared, and his reflections since have convinced him that it was sufficient. Nobody could pay a tax, or any debt, or buy a bond, without using these notes. As the notes, not being immediately redeemable, would undoubtedly be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the government at or near par value of specie they would be accepted in payment of all dues, private as well as public. Debtors, as a general rule, would pay in nothing else unless compelled by suit, and creditors would accept them as long as they would lose less by acceptance than by suit. In new transactions, sellers would demand and purchasers would pay the premium for specie in the prices of commodities. The difference to them, in the currency, whether of coin or of paper, would be in the fluctuations to which the latter is subject. So long as notes should not sink so low as to induce creditors to refuse to receive them because they could not be said to be in any just sense payments of debts due, a provision for making them a legal tender would be without effect except to discredit the currency to which it was applied. The real support of note circulation not convertible on demand into coin is receivability for debts due the government, including specie loans, and limitation of amount. If the amount is smaller than is needed for the transactions of the country, and the law allows the use in these transactions of but one description of currency, the demand for that description will prevent its depreciation. But history shows no instance of paper issues so restricted. An approximation in limitation is all that is possible, and this was attempted when the issues of United States notes were restricted to one hundred and fifty millions. But this limit was soon extended to four hundred and fifty millions, and even this was soon practically removed by the provision for the issue of notes by the national banking associations without any provision for corresponding reduction in the circulation of United States notes; and still further by the laws authorizing the issue of interest-bearing securities, made a tender for their amount, excluding interest.

The best support for note circulation is not limitation, but receivability, especially for loans bearing coin interest. This support was given until the fall of 1864, when a loan bearing increased currency interest, payable in three years and convertible into a loan bearing less coin interest, was substituted for

the six per cent. and five per cent. loans bearing specie interest, for which the notes had been previously received.

It is plain that a currency so supported cannot depreciate more than the loans; in other words, below the general credit of the country. It will rise or fall with it. At the present moment if the notes were received for five per cent. bonds, they would be at par. In other words, specie payments would be resumed.

Now, does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This certainly does not improve the value of its notes. It is an element of depreciation. In addition, it creates a powerful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become, the easier the payment of debts, and the more profitable the investments in bonds bearing coin interest.

On the other hand, the higher prices become for everything the government needs to buy, and the greater the accumulation of public as well as private debt. It is true that such a state of things is acceptable to debtors, investors in bonds, and speculators. It is their opportunity of relief or wealth. And many are persuaded by their representations that the forced circulation is not only a necessity but a benefit. But the apparent benefit is a delusion and the necessity imaginary. In their legitimate use the notes are hurt, not helped, by being made a legal tender. The legal tender quality is only valuable for the purposes of dishonesty. Every honest purpose is answered as well and better without it. We have no hesitation, therefore, in declaring our conviction that the making of these notes a legal tender was not a necessary or proper means to the carrying on war or to the exercise of any express power of the government.

§ 73. *The making of treasury notes a legal tender is in violation of the fifth amendment of the constitution.*

But the absence of necessity is not our only or our weightiest objection to this legal tender clause. We still think, notwithstanding the argument adduced to the contrary, that it does violate an express provision of the constitution, and the spirit, if not the letter, of the whole instrument. It cannot be maintained that legislation justly obnoxious to such objections can be maintained as the exercise of an implied power. There can be no implication against the constitution. Legislation to be warranted as the exercise of implied powers must not be "prohibited, but consistent with the letter and spirit of the constitution."

The fifth amendment provides that no person shall be deprived of life, liberty or property without compensation or due process of law. The opinion of the former minority says that the argument against the validity of the legal tender clause, founded on this constitutional provision, is "too vague for their perception." It says that a "declaration of war would be thus unconstitutional," because it might depreciate the value of property; and "the abolition of tariff on sugar or iron," because it might destroy the capital employed in those manufactures; and "the successive issues of government bonds," because they might make those already in private hands less valuable. But it seems to have escaped the attention of the then minority that to declare war, to lay

and repeal taxes, and to borrow money, are all express powers, and that the then majority were opposing the prohibition of the constitution to the claim of an implied power. Besides, what resemblance is there between the effect of the exercise of these express powers and the operation of the legal tender clause upon pre-existing debts? The former are indirect effects of the exercise of undisputed powers. The latter acts directly upon the relations of debtor and creditor. It violates that fundamental principle of all just legislation that the legislature shall not take the property of A. and give it to B. It says that B., who has purchased a farm of A. for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the constitution.

§ 74. — *and is inconsistent with the spirit of the constitution, as impairing the obligation of contracts.*

We think also that it is inconsistent with the spirit of the constitution in that it impairs the obligation of contracts. In the opinion of the then minority it is frankly said: "Undoubtedly it is a law impairing the obligation of contracts made before its passage," but it is immediately added: "While the constitution forbids the states to pass such laws, it does not forbid congress;" and this opinion, as well as the opinion just read, refers to the express authority to establish a uniform system of bankruptcy as a proof that it was not the intention of the constitution to withhold that power. It is true that the constitution grants authority to pass a bankrupt law, but our inference is, that in this way only can congress discharge the obligation of contracts. It may provide for ascertaining the inability of debtors to perform their contracts, and, upon the surrender of all their property, may provide for their discharge. But this is a very different thing from providing that they may satisfy contracts without payment, without pretense of inability, and without any judicial proceeding.

That congress possesses the general power to impair the obligation of contracts is a proposition which, to use the language of Chief Justice Marshall (*Fletcher v. Peck*, 6 Cranch, 132; *Const.*, §§ 1805-12), "must find its vindication in a train of reasoning not often heard in courts of justice." "It may well be added," said the same great judge (p. 135), "whether the nature of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, can be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public is in the nature of a legislative power is well worthy of serious reflection."

And if the property of an individual cannot be transferred to the public, how much less to another individual.

These remarks of Chief Justice Marshall were made in a case in which it became necessary to determine whether a certain act of the legislature of Georgia was within the constitutional prohibition against impairing the obligation of contracts. And they assert fundamental principles of society and government in which that prohibition had its origin. They apply with great force to the construction of the constitution of the United States. In like manner and spirit Mr. Justice Chase had previously declared (*Calder v. Bull*, 3 Dall., 388; *Const.*, §§ 582-99) that "an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful ex-

ercise of legislative authority." Among such acts he instances "a law that destroys or impairs the lawful private contracts of citizens." Can we be mistaken in saying that such a law is contrary to the spirit of a constitution ordained to establish justice? Can we be mistaken in thinking that if Marshall and Story were here to pronounce judgment in this case, they would declare the legal tender clause now in question to be prohibited by and inconsistent with the letter and spirit of the constitution?

It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this court, by the present majority, that the legislature has any "powers under the constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it." If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited.

§ 75. *Congress has no power under the constitution to make the bills of credit of the government a legal tender.*

Our observations thus far have been directed to the question of the constitutionality of the legal tender clause and its operation upon contracts made before the passage of the law. We shall now consider whether it be constitutional in its application to contracts made after its passage. In other words, whether congress has power to make anything but coin a legal tender.

And here it is well enough again to say that we do not question the authority to issue notes or to fit them for a circulating medium, or to promote their circulation by providing for their receipt in payment of debts to the government, and for redemption either in coin or in bonds; in short, to adapt them to use as currency. Nor do we question the lawfulness of contracts stipulating for payment in such notes, or the propriety of enforcing the performance of such contracts by holding the tender of such currency, according to their terms, sufficient. The question is, Has congress power to make the notes of the government, redeemable or irredeemable, a legal tender without contract and against the will of the person to whom they are tendered? In considering this question, we assume as a fundamental proposition that it is the duty of every government to establish a standard of value. The necessity of such a standard is indeed universally acknowledged. Without it the transactions of society would become impossible.

§ 76. *The argument that money must possess an intrinsic value.*

All measures, whether of extent, or weight, or value, must have certain proportions of that which they are intended to measure. The unit of extent must have certain definite length, the unit of weight certain definite gravity, and the unit of value certain definite value. These units, multiplied or subdivided, supply the standards by which all measures are properly made. The selection, therefore, by the common consent of all nations, of gold and silver as the standard of value was natural, or, more correctly speaking, inevitable. For whatever definitions of value political economists may have given, they all agree that gold and silver have more value in proportion to weight and size, and are less subject to loss by wear or abrasion, than any other material capable of easy subdivision and impression, and that their value changes less and by slower degrees, through considerable periods of time, than that of any other substance which could be used for the same purpose. And these are qualities indispensable to the convenient use of the standard required. In the construction of the constitutional grant of power to establish a standard

of value *every presumption* is, therefore, against that which would authorize the adoption of any other materials than those sanctioned by universal consent.

But the terms of the only express grant in the constitution of power to establish such a standard leave little room for presumptions. The power conferred is the power to coin money, and these words must be understood as they were used at the time the constitution was adopted. And we have been referred to no authority which at that time defined coining otherwise than as minting or stamping metals for money; or money otherwise than as metal coined for the purposes of commerce. These are the words of Johnson, whose great dictionary contains no reference to money of paper.

It is true that notes issued by banks, both in England and America, were then in circulation, and were used in exchanges, and in common speech called money, and that bills of credit, issued both by congress and by the states, had been recently in circulation under the same general name; but these notes and bills were never regarded as real money, but were always treated as its representatives only, and were described as currency. The legal tender notes themselves do not purport to be anything else than promises to pay money. They have been held to be securities, and therefore exempt from taxation (*Bank v. Supervisors*, 7 Wall., 31); and the idea that it was ever designed to make such notes a standard of value by the framers of the constitution is wholly new. It seems to us impossible that it could have been entertained. Its assertion seems to us to ascribe folly to the framers of our fundamental law, and to contradict the most conspicuous facts in our public history.

The power to coin money was a power to determine the fineness, weight and denominations of the metallic pieces by which values were to be measured; and we do not perceive how this meaning can be extended without doing violence to the very words of the constitution by imposing on them a sense they were never intended to bear. This construction is supported by contemporaneous and all subsequent action of the legislature; by all the recorded utterances of statesmen and jurists, and the unbroken tenor of judicial opinion until a very recent period, when the excitement of the civil war led to the adoption, by many, of different views.

The sense of the convention which framed the constitution is clear, from the account given by Mr. Madison of what took place when the power to emit bills of credit was stricken from the reported draft. He says distinctly that he acquiesced in the motion to strike out, because the government would not be disabled thereby from the use of public notes, so far as they would be safe and proper, while it cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts. 3 Madison's Papers, 1346. The whole discussion upon bills of credit proves, beyond all possible question, that the convention regarded the power to make notes a legal tender as absolutely excluded from the constitution.

The papers of the *Federalist*, widely circulated in favor of the ratification of the constitution, discuss briefly the power to coin money, as a power to fabricate metallic money, without a hint that any power to fabricate money of any other description was given to congress (*Dawson's Federalist*, 294); and the views which it promulgated may be fairly regarded as the views of those who voted for adoption.

Acting upon the same views, congress took measures for the establishment of a mint, exercising thereby the power to coin money, and has continued to

exercise the same power, in the same way, until the present day. It established the dollar as the money unit, determined the quantity and quality of gold and silver of which each coin should consist, and prescribed the denominations and forms of all coins to be issued. 1 Stat. at Large, 225, 246, and subsequent acts. Until recently no one in congress ever suggested that that body possessed power to make anything else a standard of value.

Statesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of congress. Mr. Webster expressed not only his opinion but the universal and settled conviction of the country when he said (4 Webster's Works, 271, 280): "Most unquestionably there is no legal tender and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our mints or foreign coin at rates regulated by congress. This is a constitutional principle perfectly plain and of the very highest importance. The states are prohibited from making anything but gold and silver a tender in payment of debts, and although no such express prohibition is applied to congress, *yet as congress has no power granted to it in this respect but to coin money and regulate the value of foreign coin*, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts."

And this court, in *Gwin v. Breedlove*, 2 How., 38, said: "*By the constitution of the United States gold and silver coin made current by law can only be tendered in payment of debts.*" And in *The United States v. Marigold*, 9 id., 567, this court, speaking of the trust and duty of maintaining a uniform and pure metallic standard of uniform value throughout the Union, said: "The power of coining money and regulating its value *was delegated to congress by the constitution for the very purpose*, as assigned by the framers of that instrument, *of creating and preserving the uniformity and purity of such a standard of value.*"

The present majority of the court say that legal tender notes "have become the universal measure of values," and they hold that the legislation of congress, substituting such measures for coin by making the notes a legal tender in payment, is warranted by the constitution.

But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of courts avail anything in determining the meaning of the constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard, by making notes a legal tender, is conferred upon congress by the constitution.

MR. JUSTICE BRADLEY concurred in the opinion of the court, and rendered a separate opinion.

JUSTICES CLIFFORD and FIELD concurred in the views of the Chief Justice, and rendered separate opinions.

NELSON, J., dissented.

BRONSON v. RODES.

(7 Wallace, 229-258. 1868.)

ERROR to the Court of Appeals of New York.

STATEMENT OF FACTS.—The debt involved in this case was incurred in 1851, was secured by bond and mortgage, and was payable in gold and silver coin

lawful money of the United States. In 1865 Rodes tendered, in United States notes, a sum nominally equal to the amount due, but the tender was refused. Rodes then deposited the notes in bank to the credit of Bronson, and filed his bill for the purpose of having the mortgage satisfied. The court of appeals of New York held the tender good and directed Bronson to satisfy the mortgage of record.

· Opinion by CHASE, C. J.

The question which we have to consider is this: Was Bronson bound by law to accept from Rodes United States notes equal in nominal amount to the sum due him as full performance and satisfaction of a contract which stipulated for the payment of that sum in gold and silver coin, lawful money of the United States?

It is not pretended that any real payment and satisfaction of an obligation to pay fifteen hundred and seven coined dollars can be made by the tender of paper money worth in the market only six hundred and seventy coined dollars. The question is, Does the law compel the acceptance of such a tender for such a debt? It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties. We must, therefore, inquire what was the intent and understanding of Frederick Bronson and Christian Metz when they entered into the contract under consideration in December, 1851.

· And this inquiry will be assisted by reference to the circumstances under which the contract was made. Bronson was an executor, charged as a trustee with the administration of an estate. Metz was a borrower from the estate. It was the clear duty of the former to take security for the full repayment of the money loaned to the latter.

The currency of the country, at that time, consisted mainly of the circulating notes of state banks, convertible, under the laws of the states, into coin on demand. This convertibility, though far from perfect, together with the acts of congress which required the use of coin for all receipts and disbursements of the national government, insured the presence of some coin in the general circulation; but the business of the people was transacted almost entirely through the medium of bank-notes. The state banks had recently emerged from a condition of great depreciation and discredit, the effects of which were still widely felt, and the recurrence of a like condition was not unreasonably apprehended by many. This apprehension was, in fact, realized by the general suspension of coin payments, which took place in 1857, shortly after the bond of Metz became due.

It is not to be doubted, then, that it was to guard against the possibility of loss to the estate, through an attempt to force the acceptance of a fluctuating and perhaps irredeemable currency in payment, that the express stipulation for payment in gold and silver coin was put into the bond. There was no necessity in law for such a stipulation, for at that time no money, except of gold or silver, had been made a legal tender. The bond, without any stipulation to that effect, would have been legally payable only in coin. The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment in the ordinary currency ought to be accepted.

The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them. It was to be paid, at all events, in coined lawful money.

· § 77. *History of coinage in the United States.*

We have just adverted to the fact that the legal obligation of payment in coin was perfect without express stipulation. It will be useful to consider somewhat further the precise import in law of the phrase "dollars payable in gold and silver coin, lawful money of the United States." To form a correct judgment on this point it will be necessary to look into the statutes regulating coinage. It would be instructive, doubtless, to review the history of coinage in the United States, and the succession of statutes by which the weight, purity, forms and impressions of the gold and silver coins have been regulated; but it will be sufficient for our purpose if we examine three only, the acts of April 2, 1792 (1 Stat. at Large, 246); of January 18, 1837 (5 id., 136); and March 3, 1849 (9 id., 397).

The act of 1792 established a mint for the purpose of a national coinage. It was the result of very careful and thorough investigations of the whole subject, in which Jefferson and Hamilton took the greatest parts, and its general principles have controlled all subsequent legislation. It provided that the gold of coinage, or standard gold, should consist of eleven parts fine and one part alloy, which alloy was to be of silver and copper in convenient proportions, not exceeding one-half silver; and that the silver of coinage should consist of fourteen hundred and eighty-five parts fine, and one hundred and seventy-nine parts of an alloy wholly of copper.

The same act established the dollar as the money unit, and required that it should contain four hundred and sixteen grains of standard silver. It provided further for the coinage of half-dollars, quarter-dollars, dimes and half-dimes, also of standard silver, and weighing respectively a half, a quarter, a tenth and a twentieth of the weight of the dollar. Provision was also made for a gold coinage, consisting of eagles, half-eagles and quarter-eagles, containing, respectively, two hundred and ninety, one hundred and thirty-five, and sixty-seven and a half grains of standard gold, and being of the value, respectively, of ten dollars, five dollars and two-and-a-half dollars.

These coins were made a lawful tender in all payments according to their respective weights of silver or gold, if of full weight, at their declared values, and if of less, at proportional values. And this regulation as to tender remained in full force until 1837. The rule prescribing the composition of alloy has never been changed, but the proportion of alloy to fine gold and silver, and the absolute weight of coins, have undergone some alteration, partly with a view to the better adjustment of the gold and silver circulations to each other, and partly for the convenience of commerce.

The only change of sufficient importance to require notice, was that made by the act of 1837 (5 Stat. at Large, 137). That act directed that standard gold, and standard silver also, should thenceforth consist of nine parts pure and one part alloy; that the weight of standard gold in the eagle should be two hundred and fifty-eight grains, and in the half-eagle and quarter-eagle, respectively, one-half and one-quarter of that weight precisely; and that the weight of standard silver should be in the dollar four hundred twelve and a half grains, and in the half-dollar, quarter-dollar, dimes and half-dimes, exactly one-half, one-quarter, one-tenth and one-twentieth of that weight.

The act of 1849 (9 id., 397) authorized the coinage of gold double-eagles and gold dollars conformably in all respect to the established standards, and therefore of the weights, respectively, of five hundred and sixteen grains and twenty-five and eight-tenths of a grain. The methods and machinery of coinage had

been so improved before the act of 1837 was passed that unavoidable deviations from the prescribed weight became almost inappreciable, and the most stringent regulations were enforced to secure the utmost attainable exactness, both in weight and purity of metal.

In single coins the greatest deviation tolerated in the gold coins was half a grain in the double-eagle, eagle, or half-eagle, and a quarter of a grain in the quarter eagle or gold dollar (9 Stat. at Large, 398); and in the silver coins, a grain and a half in the dollar and half-dollar, and a grain in the quarter-dollar, and half a grain in the dime and half-dime. 5 id., 140.

In 1849 the limit of deviation in weighing large numbers of coins on delivery by the chief coiner to the treasurer, and by the treasurer to depositors, was still further narrowed.

With these and other precautions against the emission of any piece inferior in weight or purity to the prescribed standard, it was thought safe to make the gold and silver coins of the United States legal tender in all payments according to their nominal or declared values. This was done by the act of 1837. Some regulations as to the tender, for small loans, of coins of less weight and purity, have been made; but no other provision than that made in 1837, making coined money a legal tender in all payments, now exists upon the statute-books.

The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates the intention of the legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them.

The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase "dollars payable in gold and silver coin, lawful money of the United States," may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States, and therefore declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number.

§ 78. *Contract to pay a certain number of dollars in gold and silver coin construed.*

Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.

We cannot suppose that it was intended by the provisions of the currency acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful.

Arguments and illustrations of much force and value in support of this conclusion might be drawn from the possible case of the repeal of the legal tender laws relating to coin, and the consequent reduction of coined money to the legal condition of bullion, and also from the actual condition of partial demonetization to which gold and silver money was reduced by the introduction into circulation of the United States notes and national bank currency; but we think it unnecessary to pursue this branch of the discussion further.

Nor do we think it necessary now to examine the question whether the clauses of the currency acts, making the United States notes a legal tender, are warranted by the constitution. But we will proceed to inquire whether, upon the assumption that those clauses are so warranted, and upon the further assumption that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather than as contracts to deliver certain weights of standard gold, it can be maintained that a contract to pay coined money may be satisfied by a tender of United States notes.

Is this a performance of the contract within the true intent of the acts? It must be observed that the laws for the coinage of gold and silver have never been repealed or modified. They remain on the statute-book in full force. And the emission of gold and silver coins from the mint continues; the actual coinage during the last fiscal year having exceeded, according to the report of the director of the mint \$19,000,000. Nor have those provisions of law which make these coins a legal tender in all payments been repealed or modified.

§ 79. *Contracts to pay in coin or in legal tender notes are equally sanctioned by law.*

It follows that there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it, in fact, convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be the actual equivalents of each other, nor was there anything in the currency acts purporting to make them such. How far they were, at that time, from being actual equivalents has been already stated.

If, then, no express provision to the contrary be found in the acts of congress, it is a just if not a necessary inference, from the fact that both descriptions of money were issued by the same government, that contracts to pay in

either were equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation as money.

The several statutes relating to money and legal tender must be construed together. Let it be supposed then that the statutes providing for the coinage of gold and silver dollars are found among the statutes of the same congress which enacted the laws for the fabrication and issue of note dollars, and that the coinage and note acts, respectively, make coined dollars and note dollars legal tender in all payments, as they actually do. Coined dollars are now worth more than note dollars; but it is not impossible that note dollars, actually convertible into coin at the chief commercial centers, receivable everywhere, for all public dues, and made, moreover, a legal tender, everywhere, for all debts, may become, at some points, worth more than coined dollars. What reason can be assigned now for saying that a contract to pay coined dollars must be satisfied by the tender of an equal number of note dollars, which will not be equally valid then, for saying that a contract to pay note dollars must be satisfied by the tender of an equal number of coined dollars?

It is not easy to see how difficulties of this sort can be avoided, except by the admission that the tender must be according to the terms of the contract. But we are not left to gather the intent of these currency acts from mere comparison with the coinage acts. The currency acts themselves provide for payments in coin. Duties on imports must be paid in coin, and interest on the public debt, in the absence of other express provisions, must also be paid in coin. And it hardly needs argument to prove that these positive requirements cannot be fulfilled if contracts between individuals to pay coin dollars can be satisfied by offers to pay their nominal equivalent in note dollars. The merchant who is to pay duties in coin must contract for the coin which he requires; the bank which receives the coin on deposit contracts to repay coin on demand; the messenger who is sent to the bank or the custom-house contracts to pay or deliver the coin according to his instructions. These are all contracts, either express or implied, to pay coin. Is it not plain that duties cannot be paid in coin if these contracts cannot be enforced?

An instructive illustration may be derived from another provision of the same acts. It is expressly provided that all dues to the government, except for duties on imports, may be paid in United States notes. If, then, the government, needing more coin than can be collected from duties, contracts with some bank or individual for the needed amount, to be paid at a certain day, can this contract for coin be performed by the tender of an equal amount in note dollars? Assuredly it may if the note dollars are a legal tender to the government for all dues except duties on imports. And yet a construction which will support such a tender will defeat a very important intent of the act.

Another illustration, not less instructive, may be found in the contracts of the government with depositors of bullion at the mint to pay them the ascertained value of their deposits in coin. These are demands against the government other than for interest on the public debt; and the letter of the acts certainly makes United States notes payable for all demands against the government except such interest. But can any such construction of the act be maintained? Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by ten-

dering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?

§ 80. *A bond made in 1851 to pay coined dollars can only be satisfied by the payment of coined dollars.*

But we need not pursue the subject further. It seems to us clear beyond controversy that the act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not "*debts*" which may be satisfied by the tender of United States notes.

It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous.

§ 81. *When contracts made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars.*

Some difficulty has been felt in regard to the judgments proper to be entered upon contracts for the payment of coin. The difficulty arises from the supposition that damages can be assessed only in one description of money. But the act of 1792 provides that "the money of account of the United States shall be expressed in dollars, dimes, cents and mills, and that all accounts in the public offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to these regulations."

This regulation is part of the first coinage act, and doubtless has reference to the coins provided for by it. But it is a general regulation, and relates to all accounts and all judicial proceedings. When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars and both made current in payments, it is necessary, in order to avoid ambiguity and prevent a failure of justice, to regard this regulation as applicable alike to both. When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally, without such specification.

We have already adopted this rule as to judgments for duties by affirming a judgment of the circuit court for the district of California (*Cheang-Kee v. United States*, 3 Wall., 320), in favor of the United States, for \$1,388.10, payable in gold and silver coin, and judgments for express contracts between individuals for the payment of coin may be entered in like manner.

It results that the decree of the court of appeals of New York must be reversed, and the cause remanded to that court for further proceedings.

Opinion by MR. JUSTICE DAVIS.

I assent to the result which a majority of the court have arrived at, that an express contract to pay coin of the United States, made before the act of February 25, 1862, commonly called the legal tender act, is not within the clause of that act which makes treasury notes a legal tender in payment of debts; but I think it proper to guard against all possibility of misapprehension by stating that if there be any reasoning in the opinion of the majority which can be applicable to any other class of contracts, it does not receive my assent.

Opinion by MR. JUSTICE SWAYNE.

I concur in the conclusion announced by the chief justice. My opinion proceeds entirely upon the language of the contract and the construction of the statutes. The question of the constitutional power of congress, in my judgment, does not arise in the case.

Dissenting opinion by MR. JUSTICE MILLER.

I do not agree to the judgment of the court in this case, and shall, without apology, make a very brief statement of my reasons for believing that the judgment of the court of appeals of New York should be affirmed. The opinion just read correctly states that the contract in this case, made before the passage of the act or acts commonly called the legal tender acts, was an agreement to pay \$1,400 "in gold and silver coin, lawful money of the United States." And I agree that it was the intention of both parties to this contract that it should be paid in coin. I go a step farther than this, and agree that the legal effect of the contract, as the law stood when it was made, was that it should be paid in coin, and could be paid in nothing else. This was the conjoint effect of the contract of the parties and the law under which that contract was made.

But I do not agree that in this respect the contract under consideration differed, either in the intention of the parties, or in its legal effect, from a contract to pay \$1,400 without any further description of the dollars to be paid. The only dollars which, by the laws then in force, or which ever had been in force since the adoption of the federal constitution, could have been lawfully tendered in payment of any contract simply for dollars, were gold and silver. These were the "lawful money of the United States" mentioned in the contract, and the special reference to them gave no effect to that contract, beyond what the law gave.

The contract then did not differ, in its legal obligation, from any other contract payable in dollars. Much weight is attached in the opinion to the special intent of the parties in using the words gold and silver coin, but as I have shown that the intent thus manifested is only what the law would have implied if those words had not been used, I cannot see their importance in distinguishing this contract from others which omit these words. Certainly every man who at that day received a note payable in dollars, expected and had a right to expect to be paid "in gold and silver coin, lawful money of the United States," if he chose to demand it. There was, therefore, no difference in the intention of the parties to such a contract, and an ordinary contract for the payment of money, so far as the right of the payee to exact coin is concerned. If I am asked why these words were used in this case, I answer that they were used out of abundant caution by some one not familiar with the want of power in the states to make legal tender laws. It is very well known that under the system of state banks, which furnished almost exclusively the currency in use for a great many years prior to the issue of legal tender notes by the United States, there was a difference between the value of that currency and gold, even while the bank-notes were promptly redeemed in gold. And it was doubtless to exclude any possible assertion of the right to pay this contract in such bank-notes, that the words gold and silver coin were used, and not with any reference to a possible change in the laws of legal tender established by the United States, which had never, during the sixty years that the government had been administered under the present constitution, de-

clared anything else to be a legal tender or lawful money but gold and silver coin.

But if I correctly apprehend the scope of the opinion delivered by the chief justice, the effort to prove for this contract a special intent of payment in gold is only for the purpose of bringing it within the principle there asserted, both by express words and by strong implication, that all contracts must be paid according to the intention of the parties making them. I think I am not mistaken in my recollection that it is broadly stated that it is the business of courts of justice to enforce contracts as they are intended by the parties, and that the tender must be according to the intent of the contract.

Now, if the argument used to show the intent of the parties to the contract is of any value in this connection, it is plain that such intent must enter into, and form a controlling element, in the judgment of the court, in construing the legal tender acts.

I shall not here consume time by any attempt to show that the contract in this case is a debt, or that when congress said that the notes it was about to issue should be received as a legal tender in payment for *all private debts*, it intended that which these words appropriately convey. To assume that congress did not intend by that act to authorize a payment by a medium differing from that which the parties intended by the contract is in contradiction to the express language of the statute, to the sense in which it was acted on by the people, who paid and received those notes in discharge of contracts for incalculable millions of dollars, where gold dollars alone had been in contemplation of the parties, and to the decisions of the highest courts of fifteen states in the Union, being all that have passed upon the subject.

As I have no doubt that it was intended by those acts to make the notes of the United States to which they applied a legal tender for all private debts then due, or which might become due, on contracts then in existence, without regard to the intent of the parties on that point, I must dissent from the judgment of the court, and from the opinion on which it is founded.

MARYLAND v. RAILROAD COMPANY.

(22 Wallace, 105-115. 1874.)

ERROR to the Supreme Court of Maryland.

STATEMENT OF FACTS.—In 1826 the Baltimore & Ohio Railroad Company was chartered by the state of Maryland. In 1836 the state subscribed \$3,000,000 to the capital of the road on certain conditions, and after some other legislation on the subject the bonds were made sterling, the interest being payable abroad, and of course in coin. The railroad company agreed to guaranty to the state a six per cent. dividend on its stock, the interest on the bonds being payable of course by the state. After the issue of United States legal tender notes, and their great depreciation during the war, the six per cent. dividend paid by the railroad company to the state was not at all equal to the five per cent. interest in coin which the state paid on its bonds, and this suit was brought to compel the company to reimburse the state for its losses by the difference in currency. There was judgment against the state, the court holding that the dividend might be paid to the state in legal tender notes.

Opinion by MR. JUSTICE STRONG.

It is not contended in this case that the contract between the parties con-

tains any express undertaking to pay what the company assumed to pay, either in coin or in any specified kind of money, or with anything other than that which might be a legal tender for the payment of debts, when the time for payment should arrive.

§ 82. *Payment in gold, since the legal tender acts, may be implied, but that implication must be collected from the contract itself.*

But the argument on behalf of the state is that the language used implies an undertaking to pay in coin, and that the case is therefore within the principle laid down in *Trebilcock v. Wilson*. Conceding that such an undertaking may be implied, when there is no express promise to pay in gold, still the implication must be found in the language of the contract. It is not to be gathered from the presumed or the real expectations of the parties. As was said in *Knox v. Lee*, 12 Wall., 457 (§§ 57-76, *supra*), "the expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined money, but neither the expectation of one party nor the anticipation of the other constitutes the obligation of the contract. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow." There is sound reason in what was said by Lord Denman in the Queen's Bench, in *Aspdin v. Austin*, 5 Ad. & Ell. (new series), 671, which was an action upon a covenant. "Where parties," said his lordship, "have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument," said he, "may have contracted on the supposition that the business would in fact be carried on and the service in fact be continued during three years, and yet neither party be willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application." Applying these principles, and looking to the contract, we discover no basis for such an implication as the plaintiff in error asserts.

§ 83. *Surrounding circumstances may be looked to, to construe a contract, but not to add a new undertaking.*

We are asked to consider the circumstances which attended the legislative enactments and induced them. The state was then in part the owner of an unfinished railroad. It was important to the interests of the people of the state, as well as to the state as a stockholder, that the road should be finished, and to accomplish its completion pecuniary assistance by the state was needed. For this purpose the state lent her credit. This was the object she had primarily in view. It is said she had also in view her own protection and that of her citizens against loss in so doing, and that it must be presumed the legislature discharged its duty and made effectual provision for such protection.

This is assuming what cannot be conceded. It assumes that it was the duty of the legislature to exact from the company all that could be exacted, and this though the company was in great need of assistance, and though it was the interest of the state that such assistance should be furnished. But if the assumption might be made, it would still be inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called "surrounding circumstances" is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking.

§ 84. *What parties "thought" or "expected" cannot be held to control the plain meaning of a contract.*

The plaintiff in error further insists that the contract, as exhibited in the acts of the legislature, amounts to an engagement on the part of the company to indemnify the state for the payments she was under obligation to make in discharge of the interest upon her bonds, by means of which the money was raised to pay her subscription to the company's stock; and as that interest could only be discharged by gold, it is argued the company must be held to have undertaken to pay in gold, since payment by legal tender notes would not amount to indemnity. But we see nothing in the contract which justifies its being construed as a contract of indemnity. It may be conceded, and it probably was the fact, that both parties thought what the company undertook to pay would suffice to pay the interest upon the state bonds from time to time as it should fall due. But nothing in the statutes, read as a whole or read with reference to the required guaranty, or read in the light of the circumstances then existing, exhibits any undertaking that the company's stipulated payments should suffice to discharge the liabilities of the state. On the contrary there is much in the statutes to repel any possible implication of an engagement to indemnify, and to make it apparent that such an obligation was not intended to be imposed or assumed. As has been noticed, the company was required by the act of 1836 to pay, after the first three years, six per cent. interest out of the profits of the work, and pay it *semi-annually*, until the net profits should be adequate to pay a six per cent. dividend, and thereafter pay a perpetual dividend of six per cent. *annually*. But the bonds first authorized to be issued by the state to pay her subscription were bonds bearing six per cent. interest payable *quarterly*, and running not less than fifty years. The commissioners for their sale were also authorized to make the interest on the bonds payable at the loan office of the state in the city of Baltimore, or at some place or places in Europe, should they find it advantageous so to contract. It is manifest, therefore, that if the bonds had been made payable in Baltimore, principal and interest, the semi-annual payment required of the company would not have met the obligations of the state, which were to pay quarterly her interest. And if the bonds had been made payable in Europe, still less would the six per cent. due from the company, though paid in gold, have enabled the state to pay her interest abroad. In addition she must have paid exchange and the cost of transmission. This seems to indicate clearly that the act of 1836 not only was not, but that it was not intended to create an obligation to indemnify the state.

And this is not all. The bonds first issued were exchanged under the act of 1839, and sterling bonds bearing five per cent. interest payable semi-annually in London were given to the company in their place. This act re-

quired the company to secure the payment of the interest at the rate of five per centum per annum on the stock (the sterling bonds) created by the act, semi-annually, at least ninety days before the 1st day of January and July in every year, for the term of three years from the date of the bonds or certificates of stock, together with the cost of transmitting the interest to London to be there paid, and also the difference in exchange of currency between London and Baltimore. This was a stipulation for indemnity. It covered all that the state was required to pay as interest on her sterling bonds. But it was expressly limited to the interest for the first three years, and hence it excluded any implication of an obligation to indemnify against all liability of the state to pay the subsequently accruing interest. Unless this is true the limitation to three years is unmeaning. After the expiration of that period, nothing more was required than the semi-annual payment of six per cent. as stipulated by the act of 1836.

It is, we think, also a matter of some significance that by the contract the payments to the state were required to be made at first out of the profits, the gross receipts of the company. No distinction was made between the kind of money the company might be compelled to receive and that required to be paid to the state. Nor was any distinction attempted to be made between the kinds of money with which the dividends to the state and other stockholders could be paid.

For these reasons, we think, the contract between the parties exhibits no just ground for an implication that the company assumed an obligation to pay its dues to the state in gold, or in any other manner than in money generally, and the fact that the company did pay the state's interest in sterling funds in London down to 1865 cannot change the construction of the contract. We do not perceive that the case of *Lane County v. Oregon* has any bearing upon the present controversy.

Judgment affirmed.

JUSTICES CLIFFORD and FIELD dissented.

SAVAGE v. UNITED STATES.

(2 Otto, 382-390. 1875.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Power was conferred upon the secretary of the treasury by the act of the 17th of July, 1861, to borrow \$250,000,000, for which he was authorized to issue bonds or treasury notes; the treasury notes to be of any denomination fixed by the secretary, not less than \$50, and to be payable three years after date, with interest at the rate of seven and three-tenths per centum per annum, payable semi-annually. Section 3 provides that the secretary shall cause books to be opened for subscription to the treasury notes for \$50 and upwards, at such places as he may designate, and under such rules and regulations as he may prescribe, to be superintended by the assistant treasurers at their respective localities, and at other places by such depositaries, postmasters and other persons as he may designate, giving notice thereof as therein directed. 12 Stat., 259.

Pursuant to the authority conferred, the secretary appointed Jay Cooke one of the special agents, to open a book for subscription to the treasury notes; and it appears that the secretary addressed to him, as such special agent, a

circular-letter of instructions, in which, among other things, he stated that "all payments must be made in the lawful coin of the United States, and that, whenever the amount subscribed shall not be paid within the period prescribed, the first payment shall be forfeited to the United States."

Sufficient appears in the finding of the court to show that the special agent opened a book for subscriptions, and that he published an advertisement, describing what the denominations of the notes would be, and giving the date when they would be issued; and that he stated that the notes would be "payable in gold in three years, or be convertible into a twenty-year six per cent. loan, at the option of the holder; that each note would have interest coupons attached, which could be cut off and collected in gold at the mint every six months, and at the rate of interest therein prescribed."

Subsequent to the publication of that advertisement, the testator of the plaintiff, then in full life, became the purchaser of treasury notes to the amount of \$15,000 of the description named in the act of congress and the advertisement, dated as described in the finding of the court; and it appears that all of the notes were in the following form: "Three years after date, the United States promise to pay to the order of — dollars with interest at seven and three-tenths per cent., payable semi-annually."

On the 10th of December, 1864, the secretary gave notice that the department was ready to redeem the notes on presentation, and that he would pay the same in lawful money, or by converting the same into bonds as authorized by law, and that interest would cease on all such notes not so presented after three months from that date, at which time the right of conversion would also cease.

§ 85. *Redemption of treasury notes; receipt of currency under protest.*

Throughout, the testator of the plaintiff insisted that it was his right to have the notes paid in gold; and on the 3d of March, 1866, he caused the notes to be transmitted here to certain bankers, with instructions to present the same at the treasury and ask for the payment of the same with interest in gold, and with directions that, if the payment in gold were refused, to accept the currency under protest. Payment in gold was subsequently refused; and the agents accepted the principal and interest after maturity in legal tender notes under protest as directed by their employer.

Gold, at the time the notes were presented, was worth in the market a premium of thirty-two cents on the dollar over the legal tender notes accepted in payment by the agents acting for the testator of the plaintiff. He demanded payment in gold; but his agents accepted the currency under protest by his directions, the payment in gold having been refused.

Based on these facts the executrix of the decedent instituted the present suit in the court of claims to recover the difference in the market value of gold and legal tender notes at the date of the payment made by the United States to the testator of the plaintiff. Judgment was rendered for the defendants in the court below, and the plaintiff appealed to this court. Appended to the finding of facts are the conclusions of law reported by the court, which, in the view taken of the case, it will not be necessary to reproduce for separate examination.

Four errors are assigned by the present plaintiff: (1) That the court below erred in holding that the subscription agent had no lawful authority to make the statement contained in the advertisement, that the treasury notes were payable in gold. (2) That the same court erred in holding that the statement,

and what appears in the record in connection therewith, did not in law bind the defendants to pay the notes in gold. (3) That the court erred in holding that the notes were lawfully paid by the defendants in the legal tender notes. (4) That the court erred in holding that the plaintiff, as executrix of the decedent, had no right of action, as against the defendants, to recover the difference in value at that time between the legal tender notes and gold.

Questions not necessarily involved in the matters of fact found by the court below will not be re-examined, even though they are presented in the assignment of errors. Controversies between parties usually depend, in the first instance, upon the matters of fact out of which the controversy in the particular case arises; and it often happens, even when it is suggested that the decision depends upon the legal questions presented, that it is, nevertheless, important to examine the facts with care, in order to ascertain whether the supposed legal questions do actually arise in the case.

Payment of the treasury notes was accepted by the testator of the plaintiff; and it appears that he, at the time the payment was made, then being in full life, surrendered the notes to the secretary for cancellation. Neither deception, mistake nor undue advantage is suggested; but the whole record shows that it was an honest difference of opinion between the secretary and the decedent as to the rights of the parties, and that it terminated by the voluntary acceptance of the legal tender notes, on the part of the agents of the decedent, in lieu of gold, as offered by the secretary, and by the surrender of the treasury notes to him for the United States. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, independently of the question whether the notes accepted in payment are or are not a legal tender, as insisted by the counsel for the defendants.

Had not the treasury notes held by the decedent been surrendered to the United States, the effect of the acceptance of the currency notes in payment might possibly have been different; but it is clear that a protest under such circumstances is utterly insufficient to qualify the effect of the waiver evidenced by the acceptance of what was offered in payment of the treasury notes in lieu of gold. Gold was claimed, but the secretary refused to pay in that medium; and the agents of the decedent, acting in pursuance of his instructions, accepted the medium offered by the secretary, knowing full well that it was offered in full discharge of the treasury notes; and it appears that they not only accepted the medium of payment offered by the secretary, but surrendered the treasury notes to the secretary, as the well known financial agent of the United States.

Actual surrender of the treasury notes to the secretary was a condition precedent to the right of the secretary to redeem the same, and that fact was as well known to the agents of the decedent as to the secretary; and it must be that they knew full well that the payment of the treasury notes could not be made unless the surrender was absolute and unconditional.

§ 86. *A protest accompanying a surrender of treasury notes, and acceptance of legal tender notes in payment thereof, being unauthorized by law, has no legal efficacy to qualify the surrender.*

Viewed in the light of these suggestions, it must be held that the protest, being unauthorized by law, was a mere *ex parte* act, without any legal efficacy to qualify the voluntary surrender of the treasury notes which both parties understood to be absolute and unconditional.

Due protest at the time of paying custom duties has the effect to give the merchant the right to sue the collector to recover back duties illegally exacted, because the act of congress provides that the protest in such a case shall have that effect. 5 Stat., 727. Congress might doubtless give a corresponding effect to such a protest in a case like the one before the court; but it is scarcely necessary to remark that there is no such statutory provision; and, in the absence of it, the ruling must be, that the protest is wholly insufficient to qualify the absolute and unconditional surrender of the treasury notes.

Enough appears to show that the surrender was made with a full knowledge of all the circumstances, and without the least compulsion; that the secretary gave public notice that the department was ready to redeem the notes, on presentation, by paying the amount in lawful money, or by converting the same into bonds, as authorized by law. Treasury notes of the kind, to a large amount, were overdue; and the holders of the same were given the option to accept payment in legal tender notes, or in the bonds authorized by law; and they were informed that interest on all such as should not be presented within the next three months would cease from the expiration of the period allowed for their presentation.

Fifteen thousand dollars of the treasury notes were held by the decedent, then in full life, and he claimed that he should be paid in gold; and it appears that the secretary refused to make the payment in that medium, and insisted that the United States had the right to redeem the same, or make the payment in the manner proposed in the published notice. Payment in gold being refused, the decedent transmitted the overdue notes to their agents here, with instructions to accept payment, under protest, in accordance with the terms proposed by the secretary; and the finding of the court shows that his agents obeyed his instructions, and that the whole amount of the notes presented, including the interest thereon after maturity, was paid in the medium proposed by the secretary.

Prompt payment, no doubt, was desired; but the decedent was under no legal compulsion to accept any other medium of payment than that which he demanded. Both he and his agents were doubtless convinced that the secretary would not recede from the position he had taken; but he was at perfect liberty to reject the terms proposed, and to refuse to surrender the overdue securities which he held.

§ 87. *Duress must be proved by the party alleging it.*

Duress, if proved, would rebut the assumption of assent, and would doubtless be sufficient to relieve a party in such a case from the effect of a compromise procured by such means; but the burden of proof to establish such a charge, in every such case, is upon the party making it; and, if he fails to introduce any such evidence to support it, the presumption is that the charge is without any foundation.

Unconditional acceptance of a medium of payment different from that promised by the United States, or absolute acceptance of a smaller sum from the secretary of the treasury than the one claimed from the United States, even in a case where the amount relinquished is large, does not leave the United States open to further claim on the ground of duress, if the acceptance of the different medium or the smaller sum is voluntary, and without intimidation, and with a full knowledge of all the circumstances; nor is the case changed if it appears that the claimant was induced to accept the different medium or the smaller sum in full as a means to secure an earlier payment of the claim.

than he could otherwise hope to procure. *Mason v. United States*, 17 Wall., 74 (Gov., § 372).

§ 88. *Compromise of claims against the United States.*

Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim, and may accept payment in a different medium from that promised, or may accept a smaller sum than that claimed; and where it appears that the claimant voluntarily entered into a compromise, and accepted payment in full in a different medium from that promised, or accepted a smaller sum than that claimed, and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer the evidences of the claim for cancellation, he cannot subsequently sue the United States, and recover in the court of claims for any part of the claim voluntarily relinquished in the compromise. *Sweeny v. United States*, 17 Wall., 77; *United States v. Child*, 12 id., 244 (Gov., §§ 367-69); *United States v. Justice*, 14 id., 549 (Gov., § 380).

Decisions of the kind by this court are quite numerous, and they show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with a full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end.

Taken as a whole, the findings of the court below show beyond all doubt that the decedent, voluntarily and with a full knowledge of all the circumstances, elected to accept payment of the treasury notes in the manner proposed by the secretary, and that the surrender of the same to the United States was absolute and unconditional. Nothing less can be inferred from the communication of his agents inclosing the securities when the same were transmitted for redemption, in which his agents say that they "present the notes for payment in accordance with the terms proposed" by the department. Such an acceptance, if intended to waive every variation from the terms antecedently demanded, could hardly be more complete or explicit; nor is its real character changed in any respect by the fact that the agents asked leave in the same communication "to enter protest, under their instructions, against payment otherwise than in gold."

They surrendered the securities, and asked leave to enter the protest in the same communication, which was, in effect, saying, "Our principal still thinks he ought to be paid in gold; but, inasmuch as the department declines to pay in that medium, he has decided to accept payment in the medium which you propose."

Suppose the controversy had respect to the sale and purchase of an article of personal property, instead of the redemption of treasury notes, and that it appeared that the price asked by the owner was \$100, and that a person desiring to purchase the same had offered the owner \$90 for it, which the owner at the time declined to accept; of course the bargain, in that state of the case, would not be complete. But suppose the owner of the article should subsequently forward the same to the person who made the offer, informing him that he would accept the offer; no one, it is presumed, would hesitate to decide that the voluntary acceptance of the offer concluded the bargain, if the person who made the offer elected to pay the money, even though the seller

might have written in the same communication that he ought to have \$10 more, and should protest that the article was worth the whole amount he asked for it in the prior negotiations. Remarks of the kind would not have the effect to qualify the acceptance of the offer and the unconditional delivery of the article.

Apply that rule to the case before the court, and it is clear that the protest of the agents did not have the effect to qualify the voluntary acceptance of the terms proposed by the secretary, and the absolute and unqualified surrender of the securities to the United States, and that there is no error in the record.

Judgment affirmed.

VERMILYE & COMPANY v. ADAMS EXPRESS COMPANY.

(21 Wallace, 138-147. 1874.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Certain United States treasury notes, issued under the act of 1865, were delivered to the express company in May, 1868, to be forwarded to the treasury for conversion into bonds. They were stolen on the way, and the express company paid the owner, advertised the loss, gave notice at the treasury department, and entered a *caveat* against the payment of the notes or their conversion into bonds. Vermilye & Co. were served with notice in May and June, 1868; and in April, 1869, they bought the notes over their counter in the regular course of business and forwarded them for redemption. Payment was refused, and the United States filed a bill of interpleader.

Opinion by MR. JUSTICE MILLER.

1. The first thing which presents itself on the facts of this case is to determine the character of the notes as it affects the law of their transferability at the time they were purchased by the appellants; for notwithstanding some testimony about the erasure of an indorsement on some of the notes, we are of opinion that it was so skilfully done as not to attract attention with the usual care in examining such notes given by bankers.

§ 89. *United States treasury notes, not a legal tender, are governed by the law of negotiable paper.*

They had the ordinary form of negotiable instruments, payable at a definite time, and that time had passed and they were unpaid. This was obvious on the face of the paper. The fact that the holder had an option to convert them into other bonds does not change their character.

That this option was to be exercised by the holder and not by the United States is all that saves them from losing their character as negotiable paper, for if they had been absolutely payable in other bonds, or in bonds or money at the option of the maker, they would not, according to all the authorities, be promissory notes, and they can lay claim to no other form of negotiable instrument. As it is they were negotiable promissory notes nine months overdue when purchased by the appellants. They were not legal tenders, made to circulate as money, which must, from the nature of the functions they are to perform, remain free from the liability attaching to ordinary promises to pay after maturity. Nor were they bonds of the class which, having long time to run, payable to holder, have become by the necessities of modern usage negotiable paper, with all the protection that belongs to that class of obligations. These were simply notes, negotiable it is true, having when

issued three years to run, which three years had long expired, and the notes were due and unpaid.

§ 90. — *the fact that they are obligations of the government will not take them out of the rule.*

We cannot agree with counsel for the appellants that the simple fact that they were the obligations of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders. The government pays its obligations according to their terms with far more punctuality than the average class of business men. The very fact that when one of its notes is due the money can certainly be had for it, if payable in money, should be a warning to the purchaser of such an obligation after its maturity to look to the source from which it comes, and to be cautious in paying his money for it. In the case of *Texas v. White*, 7 Wall., 700 (Constr., §§ 140-60), the bonds of the government issued to the state of Texas were dated July 1, 1851, and *were redeemable* after the 31st day of December, 1864. This court held that after that date they were to be considered as overdue paper, in regard to their negotiability, observing that in strictness, it is true, they were not payable on the day when they became redeemable, but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except when a distinction between redeemability and payability is made by law and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction is made.

Mr. Justice Grier was the only member of the court who dissented from the proposition, and he based it on the ground that the government had exercised its option of continuing to pay interest instead of redeeming the bonds. We have not quoted the language from the opinion in that case with any view of affirming it. It may admit of grave doubt whether such bonds, redeemable but not payable at a certain day, except at the option of the government, do become overdue in the sense of being dishonored if not paid or redeemed on that day. But the notes in the case before us have no such feature. They are absolutely payable at a certain time, and we think the case is authority for holding that such an obligation overdue ceases to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. This ground is sufficient, of itself, to justify the decree in favor of the express company.

2. When these notes were offered to the appellants for sale they carried upon their face the fact that the period for their payment or conversion into bonds had come nine months before; that for that time they had ceased to bear interest; and this would very naturally suggest the inquiry which the law of negotiable paper implies, as to the reason why they had not been paid or converted into bonds.

§ 91. *Bankers and brokers cannot establish by proof a usage or custom in dealing in negotiable paper, which, in their own interest, contravenes the established commercial law.*

Bankers, brokers and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law. Nor sitting here as chancellors can

we say that the testimony offered of the impossibility of men in that business bearing in mind the notices or loss or theft of bonds or notes well described, with which they have been served, satisfies us of the soundness of the proposition. By the well-settled law of the case they may purchase such paper before due without cumbering their minds or their offices with the memoranda of such notices. But we apprehend that the amount of overdue paper presented for negotiation is not so large as that bankers receiving notice of loss cannot make or keep a book or other form of reference which will enable them with a very little trouble to ascertain, when overdue paper is presented, whether they have been served with notice of a claim adverse to the party presenting it.

The fact that the notes were at once recognized at the treasury by reason of the notices served there, proves that no unreasonable amount of care and prudence was necessary to enable bankers and brokers to do the same. There are other rights in cases of overdue paper besides the right to purchase it, which require that care should be exercised, especially by parties who have fair notice of these rights. Bankers and brokers cannot, more than others, when warned of possible or probable danger in their business, shut their eyes and plead a want of knowledge which is wilful. In this matter also the appellants were in fault.

We attach no importance to the denial of the title of the express company. Either as bailees or as equitable owners of the notes for which they had paid the parties who intrusted them to their custody, they are entitled to recover them, and the decree of the circuit court to that effect is affirmed.

COOKE v. UNITED STATES.

(1 Otto, 389-405. 1875.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the assistant treasurer in New York for the purchase or redemption before maturity, under the act of August 12, 1866 (14 Stat., 31), of what purported to be eighteen 7-30 treasury notes, issued under the authority of the act of March 3, 1865 (13 Stat., 468), but which it is alleged were counterfeit. Cooke & Co. insist that if they honestly believed the notes in question were genuine, and, so believing, in good faith passed them to the assistant treasurer, and he, under a like belief and with like good faith, received and paid for them, there can be no recovery, even though they may have been counterfeit. As this defense meets us at the threshold of the case, it is proper that it should be first considered.

§ 92. *Liability of the United States as a party to commercial paper; treasury notes; forged paper.*

It was conceded in the argument that when the United States become parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. The Floyd Acceptances, 7 Wall., 557; United States v. Bank of Metropolis, 15 Pet., 377 (BILLS AND NOTES, §§ 127-34). As was well said in the last case, "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." It was also conceded that genuine treasury

notes, like those now in question, were, before their maturity, part of the negotiable commercial paper of the country. We so held at the last term in *Vermilye & Co. v. Express Co.*, 21 Wall., 138 (§§ 89-91, *supra*).

It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank v. Salem Bank*, 17 Mass., 45: "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his action."

§ 93. *Payment of counterfeit paper; negligence; laches not imputable to government.*

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character,—as, for example, an examination of accounts or records kept by him for the purposes of verification,—negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and, if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable must, in every case, depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds; and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. *United States v. Kirkpatrick*, 9 Wheat., 735 (Bonds, §§ 419-22); *Gibbons v. United States*, 8 Wall., 269 (Gov., §§ 377-79). Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it

fails in this, its claim upon the parties is lost. *United States v. Barker*, 12 Wheat., 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.

Such being the principles of law applicable to this part of the case, we now proceed to examine the facts. The department of the treasury is by law located at the seat of government as one of the executive departments, and the secretary of the treasury is its official head. R. S., sec. 233; 1 Stat., 65. All claims and demands against the government are to be settled and adjusted in this department (R. S., sec. 236; 3 Stat., 366), and the treasurer of the United States is one of its officers. R. S., sec. 301; 1 Stat., 65. His duty is to receive and keep the money of the United States, and disburse it upon warrants drawn by the secretary of the treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. R. S., sec. 305; 1 Stat., 65. The rooms provided in the treasury building at the seat of government for the use of the treasurer are by law the treasury of the United States. R. S., sec. 3591; 9 Stat., 59. Assistant treasurers are authorized and have been appointed to serve at New York and other cities. R. S., sec. 3595; 9 Stat., 60. The rooms assigned by law to be occupied by them are appropriated to their use and for the safe-keeping of the public money deposited with them. R. S., sec. 3598; 9 Stat., 59. The assistant treasurers are to have the charge and care of the rooms, etc., assigned to them, and to perform the duties required of them relating to the receipt, safe-keeping and disbursement of the public money. R. S., sec. 3599; 9 Stat., 59. All collectors and receivers of public money of every description within the city of New York are required, as often as may be directed by the secretary of the treasury, to pay over to the assistant treasurer in that city all public money collected by them or in their hands. R. S., sec. 3615; 9 Stat., 61. The treasurer of the United States, and all assistant treasurers, are required to keep all public money placed in their possession till the same is ordered by the proper department or officer of the government to be transferred or paid out, and, when such orders are received, faithfully and promptly to comply with the same, and to perform all other duties as fiscal agents of the government that may be imposed by any law or by any regulation of the treasury department made in conformity to law. R. S., sec. 3639; 9 Stat., 60. All money paid into the treasury of the United States is subject to the draft of the treasurer; and, for the purpose of payment on the public account, the treasurer is authorized to draw on any of the depositaries as he may think most conducive to the public interest and the convenience of the public creditors. R. S., sec. 3644; 9 Stat., 61.

§ 94. *Claims against United States to be adjusted in the treasury department; powers of assistant treasurer at New York.*

Thus it is seen that all claims against the United States are to be settled and adjusted "in the treasury department;" and that is located "at the seat of

government." The assistant treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government. He can pay only after the adjustment has been made "in the treasury department," and then upon drafts drawn for that purpose by the treasurer.

By the act of April 12, 1866, the secretary of the treasury was authorized, at his discretion, to receive the treasury notes issued under any act of congress in exchange for certain bonds; or he might sell the bonds, and use the proceeds to retire the notes. 14 Stat., 31. This exchange or retirement of the notes involved an adjustment of the claims made on their account against the government. That adjustment, as has been seen, could only be had in the treasury department; and the government cannot be bound by any payment made without it, through one of the assistant treasurers, until a sufficient time has elapsed, in the regular course of business, for the transmission of the notes to the department, and an examination and verification there.

That such was the expectation of congress is apparent from the legislation authorizing the issue of such notes. On the 23d December, 1857, an act was passed "to authorize the issue of treasury notes." 11 Stat., 257. The payment or redemption of these notes was to be made to the lawful holders upon presentment at the treasury. Sec. 2. The notes were to be prepared under the direction of the secretary of the treasury, and to be signed in behalf of the United States by the treasurer thereof, and countersigned by the register of the treasury. Each of these officers was to keep, in books provided for that purpose, accurate accounts, showing the number, date, amount, etc., of each note signed or countersigned by himself, and also showing the notes received and canceled. These accounts were to be carefully preserved in the treasury. Sec. 3. The notes were made receivable for public dues. Sec. 6. The officer receiving the same was required to take from the holder a receipt upon the back of each note, stating distinctly the date of payment and amount allowed. He was also required to make regular and specific entries of all notes received by him, showing the person from whom he received each note, the number and date thereof, and the amount of principal and interest allowed thereon. These entries were to be delivered to the treasurer with the notes; and, if found correct, he was to receive credit for the amount allowed. Sec. 7. To promote the public convenience and security, and protect the United States as well as individuals from fraud and loss, the secretary of the treasury was authorized to make and issue such instructions as he should deem best to the officers required to receive the notes in behalf of, and as agents in any capacity for, the United States, as to the custody, disposal, canceling and return of the notes received, and as to the accounts and returns to be made to the treasury department of such receipts. Sec. 8. The secretary of the treasury was directed to cause such notes to be paid when they fell due, and he was authorized to purchase them at par for the amount of the principal and interest due at the time of the purchase. Sec. 9.

The act of July 17, 1861, "to authorize a national loan, and for other purposes," provided for an issue of 7-30 treasury notes, and, in terms, re-enacted all the provisions of the act of December 23, 1857, so far as the same were applicable and not inconsistent with what was then enacted. 12 Stat., 259, secs. 1 and 10.

The acts of June 30, 1864 (13 Stat., 218), and March 3, 1865 (13 Stat., 468),

which authorized further issues of the same class of notes, did not in terms re-enact the provisions of the acts of 1857 and 1861; but they did authorize and require the secretary of the treasury to make and issue such instructions to the officers who might receive the notes in behalf of the United States as he should deem best calculated "to promote the public convenience and security, and to protect the United States as well as individuals from fraud and loss." 13 Stat., 221, sec. 8.

§ 95. *Treasury notes can be redeemed and retired only by the secretary of the treasury.*

These are public laws of which all must take notice. In the absence of any evidence showing a regulation permitting an exchange or redemption of notes at any other place than the treasury, and after settlement and adjustment in the department, it will not be presumed that one was made. The notes in question are not made payable at any particular place; consequently they are in law payable at the treasury, and this is at the seat of government and in the treasury department. In this department the secretary represents the government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the government itself; and in all commercial transactions his official negligence will be deemed to be the negligence of the government. He is specially charged with the duty of retiring these treasury notes by exchange, payment or purchase; and he is the only agent authorized to act for the government in that behalf. All who deal with the government in respect to these notes are presumed to know his exclusive authority; for it is public law. Until such time, therefore, as he has acted, or in due course of business ought to have acted, there can have been no such laches as will charge the government. He is presumed to act officially only in his department. His attention can only be demanded after the presentation of the notes at that place. It was there that the accounts and records of the issues and redemptions under the early laws were by statute required to be kept; and that is the appropriate place for keeping such similar records as the secretary of the treasury may by regulation prescribe, under the later laws, to protect against fraud and loss.

Such seems to have been the understanding of the parties in the transaction which is now under consideration. The notes were "sold" to the assistant treasurer, and were, by stamp upon their back at the appropriate place for their indorsement, made payable "to the order of the secretary of the treasury, for redemption." The payment by the assistant treasurer under such circumstances, for the purchase, did not "retire" the notes. That, upon the face of the transaction, required the further order of the secretary of the treasury. Undoubtedly it was expected, that, in due course of business, that order would be given; but until given, or at least until it ought to have been given, it cannot be said that the government has accepted the notes, and adopted them as genuine.

§ 96. — *redemption by assistant treasurer of counterfeit notes; question of delay in returning them.*

Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the government. The return should have been made within a reasonable time; and what is a reasonable time is always a question for the courts when the facts are not disputed. *Wiggins v. Burkham*, 10 Wall., 133. Here there is no dispute. The notes were delivered to the assistant treasurer on

different days between September 20 and October 8. The first suspicion in Washington in regard to their character was October 5, when a note was found, of which, upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York October 12, and the next day Cooke & Co. were notified.

The amount of 7-30 notes issued by the government was many hundreds of millions of dollars. Necessarily, the accounts and records of their issue and redemption were voluminous. Between September 20 and October 8, Cooke & Co. themselves sold to the assistant treasurer for redemption more than \$7,500,000. Other parties were at the same time making sales to large amounts. Time must be given for careful examination and scrutiny; and we do not think, that, under all the circumstances, any unreasonable delay occurred either in their transmission to or return from the treasury department.

We are all clearly of the opinion, therefore, that, if the notes were in fact counterfeit, their receipt by the assistant treasurer and his payment therefor did not preclude the United States from receiving back the money paid. So far there was no error in the courts below.

§ 97. *An instruction by the trial court, "that if the notes were printed in the department, and all ready for issue, yet, if they were not in fact issued," the United States are not bound to redeem them, under the act of August 12, 1866, was erroneous.*

It was, however, contended by Cooke & Co., that if the notes were not counterfeit, but genuine notes unlawfully and surreptitiously put in circulation, the government was bound for their payment to a *bona fide* holder, and consequently that there could be no recovery. We quite agree with the lamented judge of the circuit court who had this case before him upon error to the district court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates was exceedingly meagre, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged "that if the notes were printed in the department, and all ready for issue, yet, if they were not in fact issued, the United States could recover. The issue to bind the government," said the judge, "must be a physical act of an authorized officer."

It was conceded, on behalf of the government, in the argument here, that, if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question. The notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form, they were ready for circulation and use. In this respect they did not differ from the coins of the mint when fully stamped and prepared for issue. Coin is the money of commerce, and circulates from hand to hand as such. These notes represent the promises of the government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the government and its creditors. 13 Stat., 221, sec. 8. They were issued under the authority of "an act to provide ways and means for the support of the government" (13 Stat., 218, title) in its great peril, and they bore the "imprint of the seal of the treasury department as further evidence of lawful issue." *Id.*, 220, sec. 6.

Their aggregate amount was very large; and they were of all convenient denominations, not less than \$10. *Id.*, 218, sec. 2. The people were appealed to, through their patriotism, to accept and give them circulation. They entered largely, and at once, into the commerce of the country, and passed readily from hand to hand as, or in lieu of, money. After the close of the war, they became, in a sense, too valuable for circulation, and were on that account, to a large extent, withdrawn and held for investment.

But it is insisted, on the part of the government, that as the act of April 12, 1866, only authorized the secretary of the treasury to retire, before their maturity, notes "issued" under the authority of some act of congress, he could only take up such as were actually put out by the "physical act" of some authorized officer of the government in pursuance of law. This, we think, is too narrow a construction of the act. At the time it was passed the war of the rebellion was over. In the prosecution of this war an immense debt had been contracted. To meet the pressing demands upon the credit of the government, various forms of securities had been put forth, some of which, like those now under consideration, would mature at an early date, and sooner, perhaps, than they could be met without the negotiation of new loans. In view of this possible contingency, congress seems to have been desirous of meeting its obligations of this class whenever they could be exchanged for or retired with the proceeds of the sale of certain specified bonds having a longer time to run. The object evidently was to get rid of this species of debt, and we think the act may be fairly construed to authorize the retirement of all notes of this class outstanding which the government would be required to meet at maturity.

This leads to a reversal of the judgment. There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit the cancellation could do no harm, for they were worthless before. If they were genuine, they had already been canceled by the payment.

The judgment of the circuit court is reversed and the cause remanded, with instructions to reverse the judgment of the district court and to award a *venire de novo*. (a)

JUSTICES CLIFFORD, FIELD and BRADLEY dissented:

1. Because the United States are not liable for forged paper under any circumstances.
2. Because the United States are not liable for its paper promises fraudulently or surreptitiously put into circulation, not even if the fraudulent act was perpetrated by treasury officials.

MR. JUSTICE MILLER took no part in the decision.

§ 98. In general.—A contract for a certain amount of money, without specifying the kind, may be satisfied by the payment of any lawful money of the United States. *The Almatia*, Denny, 473.

§ 99. Where bonds were issued payable in legal tender notes, interest payable in gold coin, held, that the contract was valid and enforceable, and not in violation of the legal tender acts. *Pollard v. Pleasant Hill*, 8 Dill., 195.

(a) Reversing *Cooke v. United States*,* 12 Blatch., 43, and *United States v. Cooke*, 4 Ben., 376.

§ 100. United States 7-30 notes, issued under act of March 3, 1865, are not money, but merely evidence of indebtedness. *United States v. Vermilye*, 10 Blatch., 280.

§ 101. United States treasury notes are promissory notes. *United States v. Hardyman*, 13 Pet., 176.

§ 102. United States treasury notes are legal tender for debts due the United States for duties, taxes and sales of public lands to the full amount of principal and interest accruing on such notes. *Thorndike v. United States*, 2 Mason, 1.

§ 103. The legal tender act of congress approved February 25, 1862, is not in conflict with the constitution of the United States. *Latham v. United States*,* 1 Ct. Cl., 149.

§ 104. United States treasury notes are a legal tender for debts contracted before, as well as after, the passage of the legal tender act of 1862. (*CHASE, C. J., and CLIFFORD and FIELD, JJ., dissented.*) *Dooley v. Smith*,* 13 Wall., 604.

§ 105. The constitutionality of the legal tender acts of 1862, making United States treasury notes a legal tender for debts, reaffirmed in accordance with the principles settled in *Knox v. Lee and Parker v. Davis*, in 12 Wall., 457. *Railroad Co. v. Johnson*,* 15 Wall., 195.

§ 106. A. entered into a contract with the government in 1836 to build certain buildings, to be paid therefor in "good and lawful money of the coin of the United States." In 1863 congress passed a special act to pay A. \$74,583, the amount due him under the contract. The treasurer of the United States paid this amount in treasury notes, which were then worth, in gold, but forty-two cents on the dollar. A. protested against receiving the notes and brought an action to recover damages. *Held*, that the amount awarded by congress should be paid in the kind of money then in use, and that the act of congress could not relate back to the contract, or be construed into an assignment of any particular kind of money. *Latham v. United States*,* 1 Ct. Cl., 149.

§ 107. Treasury notes were issued in 1861 to parties subscribing to the national loan, payable in "dollars," no particular kind of money being specified. *Held*, that they might be paid at maturity in "legal tender" notes, notwithstanding the fact that the parties contributing had paid "lawful coin," and that the agents of the treasury in soliciting the loan had advertised that the treasury notes to be issued would be "payable in gold," such declaration being made without authority of law. *Savage v. United States*,* 8 Ct. Cl., 545.

§ 108. In suit to recover damages for cargo lost by reason of a collision while being shipped from a point in Canada to New York city, *held*, that the proper measure of damages was the value of the cargo, on the day it was shipped, at the place of shipment, in the currency of that place, converted into coined money of the United States, without any allowance for any premium on such coined money, and that the decree must be for a certain number of dollars in United States money thus ascertained; and the fact that under the act of congress of February 25, 1862 (12 U. S. Stat. at Large, 345), the debtor could discharge such judgment by paying it in United States notes or legal tender currency without any allowance for any depreciation in the value of such currency, could not affect the question as to the proper measure of damages or the proper mode of computing them. *Gordon v. The Propeller Mary J. Vaughan*, 7 Int. Rev. Rec., 12; 2 Ben., 47.

§ 109. A suit brought for loss of a cargo shipped from Canada to New York was appealed to the circuit court, where it was held that the measure of damages was the value of the cargo at the place and on the day of shipment, and decree was rendered giving the value of the same in Canada currency, converted into its equivalent in legal tender notes, on the day of shipment. At that time \$100 in gold were worth \$201 in notes. At the time of the decree in the circuit court \$100 in gold were worth \$112 in notes. The case came before the supreme court on appeal when gold was at a premium of but nine per cent., when it was held that the decree of the circuit court was right when rendered, and that the fact that legal tender notes had appreciated in value since that time did not authorize a reversal of the judgment. (*CHASE, C. J., and CLIFFORD and FIELD, JJ., dissented.*) *The Vaughan and Telegraph*, 14 Wall., 258.

§ 110. The principal of a ground rent cannot be construed as a "debt" within the meaning of the act of congress of February 25, 1862; hence, a tender of the principal in United States legal tender notes is not sufficient to extinguish ground rents. *Philadelphia R. Co. v. Morrison*,* 5 Phil., 515.

§ 111. Debt payable in coin.—Where judgment was rendered in California, payable in gold coin, *held*, that as all business transactions in California are based on coin values, the judgment for coin was properly rendered; that if judgment had been rendered in currency, the difference in value between coin and legal tender notes would have been added to the coin value; hence there was no error. *Edmondson v. Hyde*, 2 Saw., 205.

§ 112. In awarding a decree on a bottomry bond, which contains an agreement to pay in New York "in United States gold," the court will not allow a premium on the sum named in the decree, in order to make such amount equal to gold. *Cowan v. The Brig Jacmel Packet*,* 7 Int. Rev. Rec., 108.

§ 113. Where an American citizen in November, 1862, chartered a vessel in a foreign port for a certain sum, which by the terms of the charter was to be paid "in cash upon due delivery of the cargo," *held*, that the sum was to be paid in specie, unless the parties, at the time of entering into the contract, intended it should be paid in the legal currency of the United States. *Gladstone v. Chamberlain*, * 4 Int. Rev. Rec., 130.

§ 114. Where a contract entered into at New York called for \$2,900 "payable in gold," and a portion thereof had been paid in gold, *held*, upon suit brought for the balance due, that the decree must be for such balance in dollars, without reference to the premium on gold, and not for an amount which would be the equivalent, in legal tender notes, of such balance in gold. *Baker v. Ward*, 3 Ben., 499.

§ 115. Where judgment was rendered for the amount of a bond, payable in coin, and for \$151.88 in coin, this sum being \$2,000 Confederate money reduced to the specie equivalent, *held*, in view of *Knox v. Lee*, 12 Wall., 457, that such decree, ordering the payment in coin, was erroneous. *Bigler v. Waller*, 14 Wall., 297.

§ 116. Where a lease reserved "a yearly rent or sum of £15, current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver at their present established weight and rate according to act of assembly," etc., *held*, (1) that a contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count; (2) whether the contract be for the delivery or payment of coin or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment by a law made in pursuance of the constitution of the United States; (3) with two descriptions of lawful money in use under acts of congress, in either of which damages for non-performance of contracts, made before or since the passage of the currency acts, may be properly assessed, in the absence of any different understanding between the parties; (4) when it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly, and that such was the intent of the above contract. *Butler v. Horwitz*, * 7 Wall., 258.

§ 117. Where a promissory note is made payable "in specie" in express terms, it is payable in coin, and judgment should be entered thereon for coined dollars. Legal tender treasury notes are not a legal tender in payment thereof, the legal tender acts applying only to debts payable in money generally, and not to obligations payable by express terms in coin or other commodities. *Trebilcock v. Wilson*, * 19 Wall., 687.

§ 118. Where a party, entitled by the terms of his contract to gold coin, takes a judgment payable in currency, its amount should be for a sum equivalent in value to the amount of gold coin as bullion. *Gregory v. Morris*, 6 Otto, 619.

§ 119. Where a lease reserved on annual payment of a specified weight of pure gold in coined money as rent, judgment therefor must be entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold. *Dewing v. Sears*, * 11 Wall., 379.

§ 120. Petitions being filed by mortgagees against the surplus of certain ships sold in admiralty, the mortgages having been given to secure promissory notes payable in pounds sterling, lawful money of Great Britain, *held*, that such notes as contracts are as lawful when made since the passage of the legal tender acts as they were when made before; that the decree must be for so many dollars in gold and silver coin, lawful money of the United States, as are equivalent to the number of pounds sterling with the agreed interest added; and if the surplus and remnants in court consist of money that is less in value than gold and silver coin of the United States of an equal denomination, so much of the money must be applied to the satisfaction of the recovery as will purchase the amount of gold and silver coin of the United States for which the recovery is had. *Surplus of the Edith and the Polar Star*, * 5 Ben., 144; 5 Ben., 246.

§ 121. A bill of lading executed in Whampoa, for transportation of goods to New York, specified the amount of freight money in pounds, shillings and pence, payable in New York, June 21, 1864. *Held*, that the ship-owners were entitled to recover what, as shown by evidence, the specified amount of British coin was worth in New York, in gold and silver coined money of the United States, on the 21st of June, 1864, the recovery to be expressed to be in the gold and silver coin of the United States. *Forbes v. Murry*, * 3 Ben., 497.

§ 122. Powers of congress — Taxing state circulation. — Under the power to emit bills of credit congress can supply a currency for the whole country, and to secure the benefit of it to the people may restrain, by suitable enactments, the circulation, as money, of any notes not issued under its authority. In accordance with the above, the act of congress of July 13, 1866, levying a tax of ten per cent. on the amount of notes of any person, state bank or banking association used for circulation, *held* constitutional. *Veazie Bank v. Fenno*, 8 Wall., 533.

§ 123. A judgment for duties is properly rendered payable in gold and silver coin. *Cheang-Kee v. United States*, 3 Wall., 320.

§ 124. State taxes.—The acts of congress of 1862 and 1863, making United States notes a legal tender for debts, has no reference to taxes imposed by state authority, but relates only to debts in the ordinary sense of the word, arising out of simple contracts, or contracts by specialty. *Lane Co. v. Oregon*, 7 Wall., 71.

§ 125. Under act of 1814.—United States treasury notes issued under and by virtue of the act of 1814, chapter 77, bearing upon their face a promise by the United States to pay the principal in one year from their date, with interest from date at the rate of five and two-fifths per cent. per annum until maturity, bear interest until paid, if not paid when presented at maturity, the same as in ordinary contracts to pay between private parties. *Thorndike v. United States*,* 2 Mason, 1.

MONEY HAD AND RECEIVED.

See ACTIONS.

MONEY IN COURT.

[See PRACTICE.]

§ 1. Liens.—The proceeds, in a court of admiralty, of a sale made to satisfy a maritime lien, are subject to a lien which was enforceable against the vessel by the state law. Proceeds of the *Lady Franklin*, 2 Biss., 121.

§ 2. Where a lien is lost by delay in enforcing it, it may still be satisfied out of surplus proceeds in court. The remedy against the surplus, in such case, may be enforced by an action *in personam*, as the court has jurisdiction of the parties, and the subject-matter or fund is already under its control. *The Stephen Allen*, Bl. & How., 175.

§ 3. Where a surplus remains in a court of admiralty from the proceeds of a sale made for the benefit of a lien creditor, it may be appropriated in payment of other liens on the original property, but not of debts arising on contracts merely personal, such as debts due the master and surgeon for wages. *Brackett v. The Hercules*, Gilp., 184.

§ 4. Where a claim is made to the surplus in court, after the sale of a vessel by a proceeding *in rem*, in the admiralty, such claim, to be allowed, must be of itself, or in its origin have been, a lien upon the ship. *Harper v. The New Brig*, Gilp., 536.

§ 5. Unless it appears that a claim is either of itself or in its origin a lien on the ship, or other thing out of which the moneys were produced, such claim cannot be satisfied out of surplus or remnants in court. *Gardner v. The Ship New Jersey*, 1 Pet. Adm., 223.

§ 6. Parties entitled to sue in admiralty for the recovery of their demands may come in by petition and be paid out of the remnants in the registry, although they possess no lien upon the property out of which the remnants were obtained. *Quære*, whether such claims as are neither liens nor of a maritime character are payable out of remnants in court. *The Ship Panama*, Olc., 343.

§ 7. Appeal.—When an appeal is taken from the district to the circuit court, the fund in the registry should follow the case, there to remain until the litigation is ended. *The Lottawana*,* 20 Wall., 201.

§ 8. Wages of laborers, watchmen, etc.—Where the proceeds of sale of ship in the registry were more than sufficient to discharge all the decrees rendered against her, and petitions were filed, one by the assignee in bankruptcy of the owner, to have the surplus paid over to him, and others by various claimants to have their demands satisfied out of the surplus, *held*, that all claims for labor performed to enable the ship to deliver her cargo at the end of her last voyage, watchmen's wages for watching the vessel in port up to the time of her seizure by marshal, master's wages earned and disbursements made during the last voyage, should be paid out of the surplus as equitable liens, in preference to the claim of the assignee in bankruptcy. In the *Matter of the Surplus of the Ship Trimontain*,* 5 Ben., 246.

§ 9. Supplies; liens; mortgages.—Where supplies were furnished to a vessel about to depart on a voyage, to be paid for on her return from that voyage, but she was condemned and sold before leaving the home port, *held*, that the party furnishing the supplies trusted to the personal responsibility of the master or owner, and had no lien upon the ship or her proceeds to give him a claim upon the remnants or surplus in court, in preference to a mortgagee or other lien-holders. *Remnants in Court*,* Olc., 282.

§ 10. **Party not included in decree.**—When there is a fund in court to be distributed among different claimants, a decree of distribution does not preclude a claimant not embraced in it, having rights similar to those embraced therein, from asserting by bill or petition his rights to share in the fund, and he is entitled in the prosecution of his suit, upon proper showing, to all the remedies by injunction or order, usually exercised by a court of equity to prevent the relief sought from being defeated; and this rule prevails, even if such decree of distribution be made in obedience to a mandate of this court. In the *Matter of Howard*,* 9 Wall., 175.

§ 11. **Distributing funds in court.**—Courts of common law as well as courts of equity and admiralty have full power to make distribution of funds brought into their custody by their process. *Westcot v. Bradford*, 4 Wash., 498.

§ 12. **Order for the distribution of funds in court.**—Where, on a bill to foreclose a mortgage by sale, a fund is paid into court by the defendants as payment of the mortgage debt, and by agreement of the solicitors of plaintiff and defendants this sum is to be paid out to the plaintiff's attorney for previous services for his client, and an order to this effect is made by the court, this order is wholly without the jurisdiction of the court. *Wolfe v. Lewis*, 19 How., 281.

§ 13. **Judgment and attachment creditors.**—Proceeds of sale of ship in the registry of the court after lien creditors are satisfied belong to the owner and cannot be paid to his creditors, not even judgment creditors, having a decree *in personam* in admiralty against such proceeds. Nor while in the registry are they subject to attachment or garnishment. *The Lottawana*,* 20 Wall., 201.

§ 14. Money obtained by a marshal on an execution is in custody of the court, and not subject to attachment in a state court. *Alabama Gold Life Ins. Co. v. Girardy*, 9 Fed. R., 142.

§ 15. **Money deposited in a bank under a decree of the court, and subject to its order, is "money deposited in court"** within the meaning of the act of 1793, chapter 20, section 2; and the clerk is entitled to commissions upon such money in the same manner as if it had actually been paid into his hands. *Ex parte Prescott*, 2 Gall., 145.

§ 16. **Withdrawn without authority.**—Until paid to the informer, or into the United States treasury, the court has complete control of the proceeds of confiscated property in the registry; and if from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. Thus, where the owner of confiscated property, having obtained pardon for the offense on account of which the property had been condemned, demanded a restitution of the proceeds of his property, *held*, that as no final distribution had taken place, the officers of the court must return to the registry the proceeds of such property received by them as officers. *Osborn v. United States*, 1 Otto, 474.

§ 17. **Informers.**—The court having custody of a fund derived from forfeitures or penalties is the proper forum in which to settle the claims of informers and others to that fund. *United States v. George*, 6 Blatch., 37.

§ 18. **Money in the hand of officers of a court of admiralty, by order of the court, is subject to further order until actually paid over.** *Coulter v. Cargo of the Esperanza*, Bee, 97.

§ 19. **Proceeds of prize.**—It is a settled principle of admiralty law that all maritime claims upon the vessel extend equally to the proceeds in the registry arising from its sale, and are to be satisfied out of them. Thus where, upon libel of the government, a ship was condemned as prize, sold, and the proceeds of the sale paid into the registry, the owners of a vessel which had been sunk by the prize ship while on its way to the port of adjudication, under the command of a prize-master, were allowed damages out of such proceeds before distributing the same among the captors. *The Siren*, 7 Wall., 152.

§ 20. **Master's claims.**—After the liens upon a libeled vessel are satisfied out of the proceeds of her sale, the surplus funds remaining in court are subject to the master's claims for wages, and for disbursements on account of the vessel up to the time of her seizure, as against the owner who claims both as owner and creditor. *The Santa Anna*, Bl. & How., 79.

§ 21. A master, who has a right to sue *in personam* for wages, may proceed by summary petition against surplus proceeds of the vessel against which his claim exists. *The Stephen Allen*, Bl. & How., 175.

§ 22. **Discretion as to priority.**—In dealing with a surplus the court will use its discretion as against an owner in giving precedence to claims which would ordinarily take a secondary rank. Thus where a mate had on board his vessel a private adventure, consisting of provisions which were used for the necessary support of himself and of the crew, *held*, that he was entitled out of the surplus not only to the value of the supplies consumed by himself, but also the value of supplies consumed by the crew. *The Rodney*, Bl. & How., 226.

§ 23. **Marshaling claims.**—In the disposition of the proceeds of a vessel in court, different claims are marshaled as follows: 1. Seamen suing for wages. 2. Material-men. 3. A con-

signee for money advanced for towage, pilotage, light money and port duties, each claim carrying with it its own costs. *Ibid.*

§ 24. **Foreign creditors.**—*Quære*, whether the claim of a foreign creditor, which, although privileged in its inception, cannot be made the ground of an original suit by reason of an implied waiver of the lien, can, on petition of such creditor, be satisfied out of the surplus funds in a court of admiralty. *The Boston, Bl. & How.*, 309.

§ 25. **The assignee of a vessel**, assigned to him because of moneys advanced for its construction, is entitled to the surplus, after all other liens have been paid, in preference to common creditors of the assignor. *Harper v. The New Brig, Gilp.*, 536.

§ 26. **Funds in the hands of a committee of a lunatic** are not in the possession of the court by which the committee was appointed in such a manner as to exclude the jurisdiction of another court over such funds. *Sullivan v. Andoe*, 4 Hughes, 290.

§ 27. **Jurisdiction.**—A court of admiralty may take cognizance of and adjudicate upon claims preferred against a fund in court, and distribute that fund conformably to the legal and equitable rights of the respective claimants, without being restrained in the administration of this equity to cases of maritime jurisdiction. Upon this principle a mortgagee of a vessel is entitled to satisfaction out of the proceeds of the ship in court. *The Ship Panama, Olc.*, 343.

§ 28. **Damages sustained by a charterer of a ship** by a breach of the charter contract in the loss or delay of his voyage, through the negligence or fault of the owner, are a lien upon the vessel; and if a third person satisfies the demand and takes an assignment of the claim, he is entitled to come in upon remnants in court for repayment. *Ibid.*

§ 29. **Payment into court.**—Where there remains a surplus after the satisfaction of an execution out of the proceeds of a sale in the hands of the marshal, an order that he may be made to pay it into court to await the disposition of a suit concerning it will not be granted, there being no proof of collusion or danger of loss by reason of his retaining the money. *Day v. Emerson*,* 5 Biss., 56.

§ 30. Where the record shows that money is held by a nominal party, either plaintiff or defendant, solely as trustee for the benefit of some other person not a party to the record, it is the right of the court, at the instance of the party in interest, to order the money in controversy to be brought into court. *Nusbaum v. Emery*, 5 Biss., 393.

§ 31. While, during the pendency of a suit really between a party and the government, the holder of the money in controversy, an officer of the government and nominal defendant, ceases to be an officer, the court should make an order that the defendant pay the money into court. *Ibid.*

§ 32. The proceeds of the sale of a vessel in admiralty proving insufficient to pay all the claims of the various libelants having liens on such vessel and proceeds, it appearing that the master had taken all the sails from the vessel before her seizure and sold the same to satisfy a mortgage on the vessel held by him, the court will require him to pay the money received on such sale into the registry of the court to satisfy the claims constituting valid liens upon the vessel. *Schooner George Prescott*, 1 Ben., 1.

§ 33. Where specie, although consisting of foreign coin, is attached under process of the court, it is not to be considered as "cargo" merely, but as "money," and as such the officer is bound to pay it into court. *The Bark Laurens, Abb. Adm.*, 508.

§ 34. Under the act of April 18, 1814 (3 U. S. Stats., 127), which directs that moneys received by officers of the United States courts shall be deposited in bank, etc., the court is authorized to require its officers to pay moneys received by them into court, to be deposited in bank by the clerks of the court. *Ibid.*

§ 35. A payment of money into court admits the contract and damages only *pro tanto*; and if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him. *Donnell v. Columbian Ins. Co.*, 2 Sumn., 366.

§ 36. A payment of money into court without a plea of a previous tender operates as a tender from that date, and admits so much of the cause of action. Being a payment *pro tanto*, it seems that the plaintiff may take it out, although at the same time prosecuting his action for the remainder of his claim; but if he fails to recover more than the sum tendered, he may be required to pay costs. *Ye Seng Co. v. Corbitt*, 7 Saw., 363.

§ 37. **Practice.**—Under the forty-third rule of admiralty practice, the party entitled to remnants or the surplus in court can only obtain it by petition or motion, and any one having an interest has a right to intervene "*pro interesse suo*," whether his application involves the settlement of partnership accounts or not. Admiralty having taken jurisdiction of the subject-matter, it will continue the exercise of the same until the remnants are appropriated. Thus where a ship owned in partnership has been condemned, upon petition of part owners, having unsettled accounts between them, for a statement of account, and payment of their shares, the court will not pay the surplus to the managing owner, nor retain the amount in the regis-

try until the matter can be settled in equity, but pass upon the accounts of the several owners, and apportion the surplus among them. *The L. B. Goldsmith*,* Newb., 125.

§ 38. Money paid into court to await the decision of questions not decided in the final disposition of the suit must remain in the custody of the court until the questions shall be settled in that or some other court. *Florence Sewing Machine Co. v. Singer Manuf'g Co.*, 8 Blatch., 177.

§ 39. A court of admiralty will retain surplus funds in court to enable a creditor to pursue his relief against them by bill in equity, or it may direct their application on its decree for a maritime demand, upon the petition of the libellant in such decree. *The Santa Anna*, Bl. & How., 79.

§ 40. The surplus proceeds of a vessel sold to satisfy a maritime lien may be retained in court until all claims of a maritime nature are satisfied. *The Stephen Allen*, Bl. & How., 175.

§ 41. Where a sum of money in court has been decreed to be paid to a libellant, the court will not, upon the application of a creditor, appropriate it to a debt due by the libellant. *Brackett v. The Hercules*, Gilp., 184.

§ 42. A court of admiralty being rightfully in possession of the funds representing the ship arrested, as incident to that possession has power to decide who is entitled to withdraw them from the registry, and may retain the funds until the rights of the claimants are determined, either by direct suit or by summary petition, in the discretion of the court. *The Ship Panama*, Olc., 843.

MONEY LAID OUT AND EXPENDED.

See ACTIONS.

MONEY ORDERS.

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Abbreviations: L. & T., Landlord and Tenant; Lim., Limitations.

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Abbreviations: *L. & T.*, Landlord and Tenant. *Lim.*, Limitations. *Liq.*, Liquors. *Mer.*, Merger. *Mines*, Mines and Mineral Lands. *Mis.*, Mistake. *Mon.*, Money. *Mon. in Ct.*, Money in Court.

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